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ENVIRONMENTAL ASSESSMENT BOARD

VOLUME: 410

DATE: Wednesday, November 11, 1992

BEFORE:

A. KOVEN Chairman

E. MARTEL Member

FOR HEARING UPDATES CALL (COLLECT CALLS ACCEPTED) (416)963-1249

FARR &
ASSOCIATES
REPORTING INC.

(416) 482-3277

2300 Yonge St., Suite 709, Toronto, Canada M4P 1E4

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HEARING ON THE PROPOSAL BY THE MINISTRY OF NATURAL
RESOURCES FOR A CLASS ENVIRONMENTAL ASSESSMENT FOR
TIMBER MANAGEMENT ON CROWN LANDS IN ONTARIO

IN THE MATTER of the Environmental
Assessment Act, R.S.O. 1980, c.140;

- and -

IN THE MATTER of the Class Environmental
Assessment for Timber Management on Crown
Lands in Ontario;

- and -

IN THE MATTER of a Notice by The Honourable
Jim Bradley, Minister of the Environment,
requiring the Environmental Assessment
Board to hold a hearing with respect to a
Class Environmental Assessment (No.
NR-AA-30) of an undertaking by the Ministry
of Natural Resources for the activity of
Timber Management on Crown Lands in
Ontario.


Hearing held at the Civic Square,
Council Chambers, 200 Brady Street,
Sudbury, Ontario on Wednesday, November
11, 1992, commencing at 9:00 a.m.

VOLUME 410

BEFORE:

MRS. ANNE KOVEN
MR. ELIE MARTEL

Chairman
Member



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I N D E X O F P R O C E E D I N G S

<u>ARGUMENT:</u>	<u>Page No.</u>
Freidin (in reply)	69865-

1 ---Upon commencing at 9:00 a.m.

2 MADAM CHAIR: Good morning, Mr. Freidin.

3 MR. FREIDIN: Good morning.

4 MADAM CHAIR: The panel is ready to hear
5 your argument in reply.

6 Today is Remembrance Day and we are very
7 grateful that everyone who would not have worked today
8 came to the hearing here in Sudbury, but what we would
9 like to do is take a break just before eleven o'clock
10 so people can attend a memorial service across the
11 street if they want.

12 So why don't we break about ten to eleven
13 and return about -- what time would you suggest?
14 Return at 12:15 or 12:30?

15 How about we come back at 12:30. We will
16 adjourn at ten to eleven and come back at 12:30 and
17 that will be it for lunch. Okay?

18 MR. FREIDIN: Yes.

19 MADAM CHAIR: Thank you.

20 MR. FREIDIN: Madam Chair, I assume
21 everyone has been provided with a copy of a one-page
22 document which outlines the subject matters that I
23 intend to address during the reply argument.

24 You will note that a lot of the subject
25 matters are similar to subject matters which were

1 addressed in everyone's arguments, including the
2 subject matters were topics addressed in my
3 argument-in-chief. I don't intend to repeat my
4 argument-in-chief, but rather to respond specifically
5 to the submissions raised in the arguments of the other
6 parties.

7 REPLY ARGUMENT BY MR. FREIDIN:

8 I want to start off by dealing with a
9 number of environmental assessment matters and the
10 first matter you see is enhancement of the environment.

11 Madam Chair, Mr. Martel, submissions have
12 been made that a proponent when submitting an
13 environmental assessment must describe how the
14 environment can be enhanced through carrying out the
15 undertaking.

16 Indeed, the Coalition takes the position
17 that it is a requirement of the Environmental
18 Assessment Act that enhancement of the environment be
19 addressed, that it is a purpose of the EA Act and that
20 it must be addressed both in the environmental
21 assesment, what we are involved in here, and during
22 timber management planning at the local level.

23 Northwatch have also taken the position
24 that the Board should examine means by which a
25 proponent can enhance the environment. You will recall

1 those submissions were made primarily in relation to
2 the social and economic environment and they request
3 the Board to impose terms and conditions of approval
4 which would require enhancement measures to be
5 undertaken or to be identified as part of timber
6 management planning.

7 Mr. Axford, on behalf of the Canadian
8 Association Of Single Industry Towns, submitted that
9 enhancement must be addressed in an environmental
10 assessment and during timber management planning.

11 In that regard I would refer you to his
12 argument, submission No. 6, and you may recall his
13 response to the Board issue No. 1 which dealt with
14 forest management versus timber management where he
15 referred to the phrase in Section 2 of the
16 Environmental Assessment Act about wise management in
17 Ontario of the environment. He submitted to you that
18 what that meant was that you have to deal with
19 optimization, not just regulation.

20 The Ministry of Natural Resources'
21 response to the suggestion that enhancement is a
22 requirement is set out in MNR's argument at page No.
23 22. I would ask you to turn to that page.

24 Before we get into the some of the
25 wording on that page I should make it very clear that

1 it is the position of the Proponent that enhancement is
2 not a requirement of the Environmental Assessment Act.
3 It is not something which must be addressed either in
4 an environmental assessment or, in the case of this
5 undertaking, during timber management planning at the
6 forest management unit level.

7 On page No. 22, the first full paragraph
8 and the third pull paragraph were the ones which were
9 reproduced in Northwatch's argument where it says in
10 the first paragraph:

11 "The EA Act is not directed toward
12 enhancement of the economic situation of
13 any particular individual or group.

14 Its primary purpose is to regulate and
15 control the potential effects of various
16 undertakings on the environment."

17 The third paragraph:

18 "The EA Act does not require the
19 proponent of an undertaking to create
20 additional effects; that is by enhancing
21 or optimizing existing elements of the
22 environment which may be affected by that
23 undertaking, including the socio-economic
24 environment.

25 "To the extent that the environment is

1 enhanced, this is a positive effect of
2 the undertaking which is waived by the
3 Minister or the Board in determining
4 whether approval to proceed with the
5 undertaking should be granted under the
6 EA Act."

7 I will be making further submissions
8 about this weighing or balancing of positive and
9 negative effects later in my submissions.

10 I would direct your attention
11 particularly to footnote 63 and it is a footnote in
12 relation to the fourth full paragraph where we have
13 stated:

14 "If it were the case that every
15 proponent of every undertaking submitted
16 for approval under the EA Act were
17 required to enhance or optimize the
18 environment, the purpose of every
19 undertaking would be the same; that is
20 creating the best possible mix of
21 benefits. "

22 MNR submits that this not the intent of
23 the Environmental Assessment Act and it is not required
24 by the words of the act.

25 Footnote 63 is a comment made by the

1 former chair, and the volume and page number is
2 identified, where he stated:

3 "The Board has held itself on several
4 occasions that you are not necessarily
5 after the best environmental solution,
6 but one that on balance is acceptable.
7 Section 2 isn't indicating that the
8 purpose of the act is to provide the best
9 for the people of Ontario, but that it
10 provides on balance something that
11 contributes to the betterment which may
12 be lower in scale than the best and it
13 must be something that at least protects,
14 conserves or provides for the wise
15 management in Ontario of the
16 environment and that, I would suggest to
17 you, also doesn't mean the best
18 solution."

19 So what, in effect, I am saying, Madam
20 Chair, Mr. Martel, is that the Environmental Assessment
21 Act expects the decision maker to examine the facts as
22 to how the undertaking is carried out, and in doing
23 that assessment the decision maker determines what
24 positive effects on the environment are created by the
25 undertaking in the way the undertaking is carried out.

1 The decision maker also assesses what the
2 negative effects are and it is those positive effects
3 and negative effects that the decision maker looks at
4 and determines whether on balance the undertaking is
5 one where the positive effects are such that the
6 negative effects become acceptable, and that on balance
7 one is willing to accept the negative effects which are
8 created in order to achieve the positive effects which
9 are created by the undertaking in the manner that it is
10 carried out.

11 It is not the function of environmental
12 assessment or decision makers to look at that balance
13 and say -- pardon me, when you look at that, if on
14 balance the positives are such that it is acceptable to
15 accept a negative, then you approve the undertaking,
16 and in that situation it is not the function of the
17 decision maker, in my respectful submission, to say:
18 Well, the positive outweigh the negative, but we think
19 we can make it even more positive.

20 That, in my respectful submission, is
21 enhancements and that, in my respectful submission, is
22 not a function of a decision maker in determining
23 whether to accept an undertaking.

24 I would ask you to turn to page 31 of
25 MNR's argument. On page 31, starting in the second

1 last full paragraph, and I am not going to read it to
2 you, but you will note in the second last full
3 paragraph, four lines down in the left-hand margin it
4 says "regardless", that was where Mr. O'Leary started
5 quoting to you in relation to this argument on the
6 issue of enhancement and he read to you that section,
7 going on to to page 32 and going down to the end of the
8 first full paragraph on page 32. He may have left some
9 of it out, but in effect he read most of that.

10 The portion of that that Mr. O'Leary
11 highlighted and which give rise to some concern on
12 behalf of his client was the statement made in the last
13 sentence in the first paragraph on page 32 where the
14 Ministry's argument states, and I quote:

15 "Where it is reasonable to do so, the
16 proponent may seek to increase or
17 'enhance' the positive effects of the
18 undertaking, and to do so would obviously
19 not be inconsistent with the EA Act."

20 The Coalition took issue with that
21 because they felt it was improper to say that the
22 Proponent may because their positive is that the
23 Proponent must.

24 You will recall that he also referred to
25 the statement leading up to footnote No. 26. You will

1 see footnote No. 26 is in the second line on page No.
2 32 and you will note that the statement for which the
3 cases cited begins on page 31. If I might just read
4 that. Going to the last three lines on page 31:

5 "In previous decisions, the Board has
6 found that the purpose of the EA Act, in
7 referring to the 'betterment' of the
8 people of Ontario, is linked to the
9 concept of 'need'; that is, in approving
10 undertakings the Board should be
11 satisfied that there is a need for the
12 undertaking, and that i in some way
13 contributes to the 'betterment' of the
14 people sufficiently that the known
15 detrimental effects are acceptable."

16 Essentially that's the same proposition
17 that I just read to you a few moments ago.

18 I think it would be useful to read or
19 bring to your attention the following two paragraphs
20 because it further explains the Ministry's position in
21 this regard.

22 So after making the comment at the end of
23 the first full paragraph that one may seek to increase
24 or the positive effects of the undertaking, but it is
25 not a requirement, it goes on and says:

1 "This does not mean, however, that the
2 'betterment of the people of the whole or
3 any part of Ontario' requires, or
4 is equivalent to, enhancement or
5 'optimization' of the environment or that
6 every proponent of an undertaking must
7 seek to enhance or optimize the
8 environment; that is, to make enhancement
9 or optimization of the environment the
10 purpose of the undertaking.

11 "In the context of this hearing, the
12 proponent wishes to carry out the
13 undertaking of timber management, for the
14 purpose of providing a continuous and
15 predictable supply of wood for Ontario's
16 forest products industry. The activities
17 which comprise the undertaking of timber
18 management can have numerous incidental
19 positive effects (e.g. creation of
20 wildlife habitat and provision of access
21 for recreational and fire management
22 purposes). However, the provision of
23 those positive effects or 'benefits' is
24 not the purpose for which MNR seeks to
25 carry out the undertaking of timber

1 management. The undertaking for which
2 the proponent seeks approval in this
3 hearing is not the management of
4 non-timber resources for the purpose of
5 'optimizing' the benefits flowing from
6 the management of those resources."

7 Mr. O'Leary did not agree with the
8 interpretation that the Ministry of Natural Resources
9 put on the two cases which are identified in footnote
10 26.

11 He submitted that -- well, I would submit
12 that if one reads those cases, and one need not go much
13 further than reading excerpts which are found in
14 footnote 26, will in my submission come to the
15 conclusion that those cases submit the propositions
16 that I have been putting forward to you or support the
17 proposition that I have been putting forward in
18 relation to enhancement and what it means when you
19 balance positive and negative effects.

20 They do not, in my respectful submission,
21 support the proposition that enhancement is a
22 requirement.

23 In Volume 404 at page 69,183 to -84, and
24 that's part of the submissions made during argument by
25 the Coalition, Mr. O'Leary submitted that the result of

1 MNR's interpretation, the one that I put forward to you
2 about the balance, Mr. O'Leary submitted that the
3 result of MNR's interpretation of those cases could
4 result in a situation where an undertaking is approved
5 because the detrimental effects were found to be
6 acceptable, and then he went on and said:

7 "Notwithstanding the fact that the
8 disadvantages of proceeding with the
9 undertaking outweigh the advantages."

10 At page 69,184 he went on and said that
11 in the Coalition's view that when MNR cited those two
12 decisions -- if I could just have one moment, please.
13 He said this:

14 "And then you cite two decisions and
15 it is submitted that those decisions..."
16 this is his interpretation of those,

17 "...those decisions speak to the
18 proposition that a proponent must weigh
19 the advantages against the disadvantages,
20 not whether or not detrimental effects
21 are acceptable."

22 My response to that is, whether or not
23 detrimental effects are acceptable is the product of
24 weighing the advantages against the disadvantages.

25 We are not in any way suggesting that

1 those cases or our submission should be taken as saying
2 that an undertaking would be approved when the
3 disadvantages outweigh the advantages.

4 It is clear in our written argument, and
5 I highlight it again now, that how you determine
6 whether any detrimental effects of the undertaking are
7 on balance acceptable is by weighing the advantages of
8 proceeding against the disadvantages of proceeding.

9 In this particular undertaking, we submit
10 that the positive effects outweigh on balance the
11 negative effects of timber management and on that basis
12 the undertaking should be approved.

13 MADAM CHAIR: Could you slow down a
14 little, please, Mr. Freidin.

15 MR. FREIDIN: Yes.

16 OFAH had another concern or criticism of
17 the Ministry's position. Mr. Hanna criticized the
18 Ministry for concentrating on negative impacts and he
19 said that by doing so the Ministry had gone down the
20 wrong road. In effect, that we did not consider
21 enhancement. You will find Mr. Hanna's submissions in
22 that regard in Volume 404 at pages 69,186 to -188.

23 In response, I submit that MNR is on the
24 right road and that a reading of the Environmental
25 Assessment Act indicates quite clearly that the focus

1 is intended to be on the protection of the environment,
2 not on enhancement.

3 If you have the Environmental Assessment
4 Act before you, I would like to refer you to some
5 sections which, in my submission, support the
6 proposition that I have just made. It may or may not
7 be necessary to look at the act. I can go through this
8 fairly quickly.

9 Section 2, that was referred to a number
10 of times by Mr. Hanna, is the purpose section of the
11 act and it refers to providing for the protection,
12 conservation and wise management in Ontario of the
13 environment.

14 It doesn't use the words enhancement. If
15 enhancement was to be one of the purposes of the act, I
16 submit to you it would have been a very easy matter for
17 the legislative drafters to include the word and it is
18 not there.

19 In Section 5(3), and in particular
20 5(3)(c)(iii), it is clear that the focus is on
21 protection. 5(3) is the section which indicates what
22 the environmental assessment shall consist of and it
23 indicates that after identifying the potential effects
24 that might be caused it says:

25 "There must be a description of..."

1 and I quote,

2 "...the actions necessary or that may
3 reasonably be expected to be necessary to
4 prevent, change, mitigate or remedy the
5 effects upon or the effects that might
6 reasonably be expected upon the
7 environment by the undertaking, the
8 alternative methods of carrying out the
9 undertaking and the alternatives to the
10 undertaking."

11 In my submission those words indicate the
12 focus is on prevention of negative effects.

13 In Section 14(1)(b)(ii), and Section
14 14(1)(b) is the section which indicates the types of
15 terms and conditions the Board can impose, and in that
16 section it indicates that you can impose terms and
17 conditions requiring or specifying the works or actions
18 to prevent, mitigate or remedy effects of the
19 undertaking on the environment.

20 The last section I would refer you to is
21 back to Section 5(3) and in particular 5(3)(d) which
22 indicates that an environmental assessment must contain
23 an evaluation of the advantages and disadvantages to
24 the environment of the undertaking, the alternative
25 methods of carrying out the undertaking and the

1 alternatives to the undertaking.

2 There is no reference there to
3 enhancement and it is my submission that it is that
4 provision which is the direction to carrying out the
5 balancing of positive and negative effects analysed in
6 Section 5(3)(c). That is the direction to do the
7 balancing of positive and negative that I referred to
8 earlier in my submissions.

9 I should point out that on page 31 of our
10 argument we make the comment in the second last
11 paragraph, in the last line, just so there is no doubt
12 about this:

13 "The EA Act clearly does not
14 contemplate that there will be no
15 negative environmental effects."

16 If it were otherwise we wouldn't be doing
17 the balancing act contemplated by Section 5(3)(d).

18 The next point I would like to address is
19 to sort of answer the question of whether MNR has
20 suggested in its case somewhere that enhancement is a
21 requirement, and I emphasize requirement, because some
22 parties have suggested that that is what has occurred.
23 MNR submits that those suggestions are incorrect and
24 should not be accepted.

25 I am referring specifically to the

1 comment by Northwatch where they suggested that MNR has
2 admitted that there is a duty or a requirement to
3 enhance as part of the environmental assessment or
4 during planning at the local level.

5 The portion of Northwatch's argument
6 where you will find that position set out is at page 24
7 of their argument where, after reproducing two of the
8 paragraphs from our argument where we basically said
9 enhancement is not part of environmental assessment,
10 their argument states:

11 "In their evidence the proponent
12 provides arguments that would suggest
13 otherwise. Suggests, in fact, that at
14 least one of the purposes of the
15 undertaking is to enhance the
16 socio-economic environment."

17 Then they cited a comment in the
18 introduction to that portion of our Panel No. 10 that
19 dealt with social and economic environment.

20 That section said:

21 "The purpose of this document is to
22 identify the potential environmental
23 effects of the various systems and
24 methods of harvest on the socio-economic
25 environment and the actions that can be

1 taken to enhance..." and she emphasized
2 enhanced,

3 "...positive effects. "

4 It is my submission, Madam Chair, Mr.
5 Martel, that although timber management may create
6 positive effects on the social and economic
7 environment, it is not a requirement that any
8 particular effect be created.

9 A proponent may in its discretion do or
10 take certain actions to create a positive effect.
11 Indeed, perhaps, to attempt the benefit or produce
12 positive effects for a particular segment of society,
13 but it is not a requirement to do so, either as part of
14 forest management planning at the local level or
15 environmental - I am reminded that I said forest
16 management planning - timber management planning at the
17 local level or in environmental assessment for the
18 reasons I have indicated.

19 Having gone through these submissions,
20 assuming for the moment you accept them and say: All
21 right, we agree with Mr. Freidin's submission that it
22 is not a legal requirement to enhance, you may ask
23 yourself: Well, should the Board order enhancement
24 measures or require the planning process to consider
25 them even if it is not a requirement of the EA Act.

1 The answer to is that to that question is
2 no, you shouldn't.

3 The reasons I make that submission is
4 because, in my submission, to do so would be beyond
5 your jurisdiction.

6 Why? Firstly, if it is not a purpose of
7 the Environmental Assessment Act to do so, you will be
8 going beyond your mandate to order it to occur.

9 Secondly, attempting to enhance the
10 environment through the means proposed by some parties,
11 I am referring particularly to Forests for Tomorrow and
12 the Coalition, is, in my submission, a different
13 purpose than the purpose of the undertaking of timber
14 management and the Board has decided that the purpose
15 of the undertaking should not be changed.

16 Thirdly, once you are into a situation of
17 trying to enhance the environment, you are involved in
18 an exercise of making decisions regarding what you want
19 to produce from the land base, and I submit that
20 regardless of how you characterize that exercise - I
21 emphasize, regardless of how you characterize that
22 exercise - you are involved in optimization or making
23 policy decisions regarding land use.

24 The reason that I emphasized the phrase
25 'regardless of how you characterize it' is because the

1 Coalition have said that they have dropped their goal
2 statement in their terms and conditions.

3 Their original terms and conditions 3 and
4 4, the ones which in effect indicated that the purpose
5 that they were trying to achieve was the optimum --
6 pardon me, the mix of benefits. I should have the
7 exact words - the optimum mix of benefits, I submit to
8 you that you should -- they indicated as a result of
9 changing that, by dropping that they were no longer
10 doing or attempting to do indirectly what they couldn't
11 do directly.

12 I submit to you that you should reject
13 that submission because the minute you start talking
14 about enhancement, which they continue to do, they are
15 talking about pursuing a different purpose.

16 It is interesting to note that although
17 they dropped the goal statement, with few minor
18 exceptions everything else in their lengthy terms and
19 conditions have stayed the same.

20 You will remember Dr. Quinney's evidence
21 during my cross-examination that everything in their
22 terms and conditions were designed to achieve the
23 purpose as set out in their terms and conditions 3 and
24 4.

25 Therefore, based on that evidence alone,

1 it is clear that the Coalition, notwithstanding
2 dropping two terms and conditions, are continuing to
3 attempt to achieve those same purposes which are
4 different than, and Dr. Quinney agreed with me, are
5 different than the purpose of the undertaking which has
6 been put before you for approval.

7 O'LEARY: Madam Chair, if I might just
8 briefly intercede here.

9 Mr. Freidin indicated that but for the
10 change in respect of the goal statement that the
11 Coalition had made virtually no changes to its terms
12 and conditions and, with respect, that's incorrect.

13 In fact, we handed out with our summary a
14 list of those deletions and changes and it is
15 respectfully submitted that those are quite
16 significant. I think Mr. Freidin is incorrect in that
17 regard I draw that to his attention.

18 MR. FREIDIN: Madam Chair, I ask you to
19 examine the changes and come to your own conclusion on
20 that matter.

21 If I haven't given enough credit to the
22 changes which were made I apologize, but I would ask
23 you to look at the changes and answer the question on
24 your own, whether in fact the changes are substantial
25 enough that they are really no longer attempting to

1 achieve the same purpose as originally stated.

2 The next issue that I would like to
3 address are the submissions of Forests for Tomorrow and
4 the Coalition revolving around the fact that no level
5 of wood supply is contained in the statement of purpose
6 of the undertaking.

7 Forests for Tomorrow have submitted that
8 because there is no specified level in that statement
9 of purpose that any alternative method of planning
10 which produces a predictable and specified level will
11 meet the purpose of the undertaking.

12 The Coalition in Volume I of their
13 written argument at page 45, commencing at page 45 deal
14 with this issue of no level of wood being specified.
15 In paragraph 168 they say, and I quote:

16 "There is no explicit or implicit
17 suggestion that the term continuous has
18 any specific level of wood supply
19 attached."

20 That is the term 'continuous' in the
21 statement of purpose is to provide a continuous and
22 predictable supply of wood to Ontario's forest products
23 industry.

24 At paragraph 157 they state, and I quote:

25 "The statute..." referring to the EA

1 Act,

2 "...requires that alternative levels of
3 wood supply and the advantages and
4 disadvantages of each for the environment
5 must be considered. It is submitted that
6 the lack of a specific number or level
7 for wood supply in the statement of
8 purpose does not mean that no wood can be
9 supplied or that the amount of wood
10 supplied becomes a proper subject matter
11 of planning at the forest management unit
12 level."

13 It would be okay if the amount of wood
14 supply was changed or predicted every five years
15 because the level of wood would still be continuous.

16 I submit to you that such an
17 interpretation is just impractical given the reality of
18 the forest industry, the provincial program of timber
19 management and the practice of timber management as it
20 has been described to you over the last four and a half
21 years.

22 You have heard that the Industry requires
23 a level of certainty regarding the wood supply it will
24 have. Those submissions have been made primarily in
25 the context of saying that the Industry has to know the

1 land base which is available for timber management
2 because it is on that basis that long-term projections
3 are made and investment decisions are in part based.

4 In my submission, to look at this issue
5 of wood supply, in terms of whether it is in the
6 statement of purpose, in such a theoretical and
7 unrealistic way as to say let's discuss that issue of
8 wood supply at the FMU level every five years.

9 It is my respectful submission that what
10 the submissions of FFT and the Coalition come down to
11 is an untenable proposition and one which the Board
12 should not accept.

13 The next subject matter on the outline is
14 the purpose of the undertaking of timber management --
15 no, sorry, I have got it as planning as part of the
16 undertaking.

17 The issue was raised during the argument
18 of many of the other parties as to what gets approved
19 when the undertaking is approved. Forests for Tomorrow
20 stated in their oral submissions that:

21 "In a class environmental assessment
22 the undertaking doesn't get approved,
23 rather the environmental assessment gets
24 approved."

25 They stated that.

1 "In a class environmental assessment
2 the undertaking doesn't get approved,
3 rather the environmental assessment gets
4 approved."

5 MR. LINDGREN: Madam Chair, if Mr.
6 Freidin is going to state the position of FFT he has an
7 obligation to state it correctly.

8 FFT clearly submitted to the Board that
9 under an environmental assessment hearing like this in
10 a Class EA situation it is the planning process in a
11 Class EA that gets approved. That's what the
12 undertaking is, not that no undertaking gets approved.
13 That's not the position of FFT.

14 MR. FREIDIN: I don't have ready access
15 to the transcript where that particular proposition
16 comes from. I will attempt to provide it to the Board.
17 If I can't I will retract the statement.

18 It is quite clear and very relevant to my
19 later submission that FFT are taking the proposition
20 that the undertaking is the planning process and the
21 planning process only, but we will come to that in a
22 moment.

23 The Coalition have stated that the
24 activities aren't approved as a result of this
25 environmental assessment because to do so would be

1 granting the proponent, in effect, a carte blanche to
2 carry out timber management without any bump-up
3 provisions. They say --

4 O'LEARY: May I ask, Mr. Freidin, where
5 is the reference in the argument to that statement?

6 MR. FREIDIN: I will give you that one
7 too. I don't have it.

8 I am going to make this submission on the
9 basis of FFT's proposition that they have indicated
10 that the environmental assessment gets approved and not
11 the undertaking. You will be able to disregard that if
12 I can't substantiate that that is the proposition that
13 they put forward.

14 Let me just very quickly indicate that if
15 you look at the act it is quite clear that the act
16 talks about environmental assessments being accepted
17 and undertakings being approved, and if anyone has left
18 the suggestion with you in the class environmental
19 assessment that an undertaking doesn't get approved,
20 that there is no basis for that. Just look at the act.

21 The act talks about the approvals of
22 undertakings and that means that you get approval of
23 the undertaking whether it is an individual project, an
24 individual environmental assessment or an environmental
25 assessment in relation to a class of undertakings.

1 Madam Chair, I think the best thing for
2 me to do is rather than have the next few comments
3 based on the situation which, if my friend is right,
4 doesn't even exist, I am going to put a tab here in my
5 book and during the break I will see whether I can find
6 the support for my proposition and I will come back to
7 this. I will advise you either way what the result of
8 my search is.

9 During Forests for Tomorrow's argument,
10 Mr. Lindgren was critical of MNR's argument in a number
11 of places, but in one place in particular he indicates
12 that MNR is taking an inconsistent position, that in
13 one place they say they agree with your ruling of
14 January 17th, 1990 and in another the Ministry
15 disagrees.

16 The section of MNR's argument that Mr.
17 Lindgren was referring to can be found at page 7 and 8
18 of MNR's argument.

19 If you look at page No. 7, in the third
20 full paragraph, there is indented a portion from the
21 Board's ruling of January the 17th, 1990 where it
22 indicates, four lines up from the bottom of that quote:

23 "...the 'undertaking' before this
24 Board should properly be defined or
25 characterized as a Timber Management

1 proposal, plan or program in respect of
2 the activities of access, harvest,
3 renewal and maintenance and hereby makes
4 a finding to that effect..."

5 You will note we have added the
6 underlying.

7 In that particular finding you have said
8 that the undertaking was a proposal, plan or program
9 and we agreed with that because the undertaking is a
10 program, a provincial program of activities.

11 If you go over the page, to page 8, you
12 will see in that same ruling you made certain comments,
13 and the first part of the quote says:

14 "It was and continues to be the
15 Board's view that the undertaking before
16 the Board comprising the subject Class EA
17 should properly be described in terms of
18 a proposal, plan or program (i.e. a
19 timber management planning process) in
20 respect of the activities..."

21 It is that characterization with which
22 MNR disagree and we disagree because, in our
23 submission, the provincial program of timber management
24 cannot be described as just a planning process.

25 Now, Mr. Lindgren made submissions to you

1 that as a result of legal submissions I made to you in
2 my argument-in-chief that somehow the Board, if you
3 accepted my proposition about alternative planning
4 processes and alternative methods, that somehow you
5 would be in a position where you could not consider the
6 submissions of other parties regarding how to modify,
7 improve the timber management planning process that MNR
8 has put before you, that somehow you are going to lose
9 your discretion to do that because of the submissions
10 that I made.

11 I want to highlight a comment on page No.
12 9 of our argument and it is about three quarters the
13 way down the page and in capital letters it says:

14 "NOTE: MNR has never taken the
15 position that the Board is precluded
16 from adopting proposals put forward by
17 other parties in relation to planning for
18 the activities of timber management,
19 because MNR does not view the planning
20 process as part of the undertaking."

21 Now, accepting for the purpose of the
22 argument that timber management is part of the
23 undertaking, our position has not changed; that is, we
24 are not taking the position that you are precluded from
25 adopting proposals put forward by other parties in

1 relation to planning for the activities of timber
2 management. You can look at the proposals of other
3 parties, and I emphasize re timber. You can look at
4 our proposals

5 MR. MARTEL: Can you tell me what that
6 means, Mr. Freidin, because MNR does not view the
7 planning process as part of the undertaking?

8 MR. FREIDIN: That section was there and
9 you will recall that we had taken the position that it
10 is not necessary for you to revisit your earlier
11 decision.

12 We are willing to proceed without
13 challenging that particular finding, and you will
14 recall I said that we wanted three or four propositions
15 to be accepted because of concerns about the effect
16 that your decision would have or could have without the
17 clarification.

18 What I am saying is, the Ministry does
19 not accept the correctness of the decision that timber
20 management planning is part of the undertaking.

21 We have taken the position in this
22 environmental assessment that it is unnecessary to ask
23 you to change that and we have felt that it would be
24 appropriate from the Proponent's perspective that as
25 long as you make those clarifications that we ask for,

1 that you accept the proposition we made for the
2 concern, is not such that it would necessitate us
3 asking you to revisit your decision

4 If I might, Madam Chair and Mr. Martel,
5 tell you what the import of this is for suggestions and
6 positions taken by some of the other parties, I can
7 just sort of reiterate so we have got it all at once,
8 MNR submits that the Board can entertain submissions of
9 other parties for timber management planning, timber
10 management planning and modify the Proponent's proposed
11 planning process as long as it remains a timber
12 management planning process.

13 What the Board cannot do, in my
14 respectful submission, is to accept or impose a
15 planning process in relation to something other than
16 timber management, and it is MNR's submission that the
17 planning process put forward by Forests for Tomorrow
18 and the Coalition is a different undertaking to achieve
19 a different broader purpose.

20 Forests for Tomorrow have indicated quite
21 clearly that the planning process that they want is a
22 planning process in relation to integrated forest
23 management and in MNR's submission submission that is a
24 different matter, requires a different undertaking to
25 achieve a different broader purpose.

1 The next topic that I would like to deal
2 with are submissions made by some of other parties in
3 relation to Section 5(3) of the Environmental
4 Assessment Act. A number of the parties have taken the
5 position that the timber management planning process
6 must be one that meets the requirements of Section 5(3)
7 of the Environmental Assessment Act.

8 If I could just have one moment, please.

9 Forests for Tomorrow have submitted that
10 you are required -- that one is require to consider
11 alternative environmental effects for each project at
12 the local level and that to have that requirement would
13 not result in duplication between what occurred in this
14 environmental assessment because this environmental
15 assessment did not deal with the specific sites upon
16 which operations might be planned for during any
17 particular timber management planning exercise.

18 The Coalition have submitted that if the
19 Board accepts MNR's interpretation of Section 5(3) of
20 the Environmental Assessment Act, vis-a-vis Section
21 5(3), and you will recall that MNR's position is that
22 Section 5(3) is considered only once in relation to an
23 undertaking and that is during the environmental
24 assessment, the Coalition has suggested that if you
25 accept MNR's interpretation that MNR will have avoided

1 the rigors of the Environmental Assessment Act and
2 raises the picture of a flood of proponents to the EA
3 branch trying to get approval for class environmental
4 assessments.

5 I preface my remarks in response to those
6 positions by reminding the Board that the wording of
7 the Environmental Assessment Act does not support the
8 propositions put forward by those parties who say that
9 the requirements of Section 5(3) must be incorporated
10 and be repeated in the planning process at the forest
11 management unit level.

12 In my submission that is clearly not the
13 case by simply looking at the wording of Section 5(3)
14 of the act which says:

15 "An environmental assessment submitted
16 to the Minister pursuant to subsection 1
17 shall consist of..." and then it lists
18 the environmental assessment.

19 There is not going to be another
20 environmental assessment in relation to this hearing.
21 It doesn't make any difference whether it is an
22 individual project which is being assessed or whether
23 it is a class of undertakings which is being assessed.

24 In my submission there is one
25 environmental assessment and the the act says in the

1 environmental assessment and then it says 5(3) must be
2 complied with.

3 As as matter of statutory interpretation,
4 5(3) is a requirement which must be met in the
5 environmental assessment and we submit that we have
6 done that in a way which satisfies the requirements of
7 that section.

8 It is our submission that timber
9 management plans are not individual environmental
10 assessments which some of the parties have suggested
11 that they are.

12 In Chapter 1.5 of the Ministry's
13 argument, at page 69 we describe why MNR took the
14 approach that timber management could properly be
15 described as a class of undertakings.

16 MADAM CHAIR: What page are we on, Mr.
17 Freidin?

18 MR. FREIDIN: I'm sorry. It is MNR
19 argument, Volume No. I, page 69.

20 MADAM CHAIR: Thank you.

21 MR. FREIDIN: You will see the
22 explanation for taking the position that timber
23 management could be properly described as a class of
24 undertakings is set out in the third full paragraph.

25 I would just like to repeat part of what

1 is there because it highlights some of the reasons, but
2 also will remind you of some of the voluminous evidence
3 that you have heard.

4 "Although the specific methods used to
5 implement the undertaking will vary from
6 place to place the range of methods
7 available for use across the area of the
8 undertaking can be described...

9 Although the potential effects of the
10 activities and the measures available to
11 prevent, minimize, mitigate or remedy
12 those effects will vary from place to
13 place, the range of effects and the range
14 of measures available to prevent, migrate
15 minimize or remedy those effects can be
16 described for the entire area of the
17 undertaking."

18 That's what we have done in this
19 environmental assessment.

20 As described in that chapter and in our
21 argument, the level of detail and the specifics of the
22 planning at the local level must be influenced by the
23 specific undertaking which is being assessed and
24 because of this hearing and the type of evidence you
25 have heard, the planning at the local level need not be

1 the same as if each TMP was an individual environmental
2 assessment.

3 If an individual environmental assessment
4 had to be carried out every time a timber management
5 plan was prepared, then the only reason for this class
6 environmental assessment would be to design a common
7 planning process for individual environmental
8 assessments, but we submit that class environmental
9 assessments are much more than that.

10 Mr. O'Leary said that the development of
11 a common planning process is a benefit of class
12 environmental assessments and approvals of classes of
13 undertakings, and we agree, but as stated, there is
14 much more to it depending on the specific undertaking
15 being considered and the extent and detail of the
16 environmental assessment in relation to that
17 undertaking.

18 The suggestion of Mr. O'Leary that
19 proponents would somehow line up to submit their Class
20 EAs to escape the rigors of the act, I would only say
21 that if they think four and a half years of a hearing
22 is not rigorous examination of an undertaking, then let
23 them start lining up.

24 The Ministry of the Environment made
25 submissions in relation to Section 5(3). The Ministry

1 of the Environment submitted that meeting Section 5(3)
2 at the local level means considering essential elements
3 of Section 5(3) and they describe those essential
4 elements as being environmental effects, the
5 consideration of alternatives and mitigation measures.
6 So they characterize it as considering essential
7 elements of 5(3).

8 Other parties have said that Section 5(3)
9 requirements apply at the local level, that they apply
10 as a requirement of law and that all of the sections or
11 subject matters addressed apply.

12 In my submission, when those parties - I
13 am not referring to MOE now - when those other parties
14 say that Section 5(3) applies at the local level, they
15 are saying something more than what MOE have submitted.
16 They are saying that the Proponent has to consider all
17 the requirements of Section 5(3) including purpose and
18 alternatives to and what has become common in
19 environmental assessment cases and that is
20 consideration of the null alternative in relation to
21 alternatives to the undertaking.

22 I would submit that considering some -
23 using MOE's words - of the elements of 5(3) at the
24 local level because it is believed to be good
25 environmental planning or it would be something which

1 would be desirable to have in a planning process at the
2 local level is quite different than saying that those
3 elements must be considered as a requirement of law.

4 MNR agrees that these elements or matters
5 should be part of a planning process for some aspects
6 of timber management planning where the Board feels
7 that it makes sense that that be the case, but the
8 Board would do that not as a matter of law and because
9 it would not be done as a matter of law, it is
10 incorrect to say that those elements must as a matter
11 of law apply to all of the activities in the same way
12 or, indeed, to say that one of those elements -- in
13 effect, you can say one of those elements need not
14 apply to a particular part of the planning process at
15 all.

16 It is open to you using your common sense
17 as to your view as to what is appropriate, not because
18 you think that you have to do something as a
19 requirement of law.

20 MS. SEABORN: Excuse me, Mr. Freidin.

21 Madam Chair, I don't think we made the
22 submission to you that it was not a requirement of law
23 for MNR to address Section 5(3).

24 MR. FREIDIN: We are saying then as a
25 matter of law it is not required. It is as simple as

1 that.

2 I don't want you to get the impression,
3 of course, that when you impose your terms and
4 conditions setting out what a planning process is that
5 that won't become a matter of law. That will be a
6 requirement of law. I am thinking, you shouldn't feel
7 that you must include certain things in it as a
8 requirement of law.

9 The bottom line, Madam Chair, Mr. Martel,
10 is, as you have heard me say before, there is no
11 cookbook for your decision. You decide what activities
12 need what type of planning and the nature of that
13 planning and the type of planning, including the amount
14 of detail that's required in terms of documentation and
15 whether alternative need be considered.

16 The Ministry of the Environment made
17 submissions that the terms and conditions of the
18 Ministry of Natural Resources in conjunction with
19 theirs together, and I quote "sufficiently satisfy the
20 requirements" of Section 5(3) of the Environmental
21 Assessment Act.

22 Ms. Seaborn went on and said, but we can
23 do more than the minimum requirements of the act.

24 In my submission, Madam Chair, if you
25 meet the requirements of the act, you meet the

1 requirements of the act. I mean, either you meet the
2 requirements or you don't.

3 If you sufficiently satisfy the
4 requirements of the Environmental Assessment Act, then
5 you have satisfied the requirements of the
6 Environmental Assessment Act and one cannot say as a
7 requirement of law you must more sufficiently meet the
8 requirements of the Environmental Assessment Act.

9 So if one was going to go on and do more,
10 you do so because it makes sense to do so in your
11 discretion not because more is necessary to meet the
12 requirements of the act.

13 The next subject matter, Madam Chair,
14 that I would like to address is the subject matter of
15 null.

16 I assume, Madam Chair, that having regard
17 to the decision to break at ten to eleven we will go
18 right through until ten to eleven; is that correct?

19 MADAM CHAIR: Yes, that is correct, Mr.
20 Freidin.

21 MR. FREIDIN: I know that in relation to
22 the subject matter of null you might want me to say
23 nothing, but I will.

24 MR. MARTEL: The preferred alternative.

25 MR. FREIDIN: I considered it and

1 thought...

2 Firstly, the Ministry of the Environment
3 referred to MNR's argument at page 83 and made the
4 submission that MNR has admitted that in certain
5 places, at certain times operations will not occur and
6 that that is application of the null.

7 The section that they refer to or must be
8 referring to are the first three lines in the first
9 full paragraph on page 83 where we state:

10 "We do not dispute the the specific
11 conditions encountered at the management
12 unit level may dictate that certain
13 timber management activities should not
14 take place at specific times or locations
15 for sound environmental reasons."

16 You will know, and I am not going to take
17 you through it because I did so in my
18 argument-in-chief, but it is in the very same paragraph
19 if you read on where we indicate that looking at it and
20 describing that as the null or an application of the
21 do-nothing alternative is analytically incorrect. So
22 just bring that to your attention.

23 The Ministry of Natural Resources says
24 that decisions to not operate is the product -- this
25 goes to something that you raised with Ms. Seaborn, Mr.

1 Martel, and I will come to that in a moment, but we say
2 that the decision to not operate is the product of the
3 planning.

4 It is not a consideration or an option
5 which you identify in advance of planning, that you
6 then go on and consider in all cases and then determine
7 whether to select it from amongst the options.

8 Mr. Martel, you made the observation, you
9 put it this way when Ms. Seaborn described a reserve
10 being created around a waterbody. She characterized
11 that as the application of the null. You said that it
12 didn't start out as null, it is as a result of thinking
13 that you dismiss null, and you suggested maybe the
14 Ministry of the Environment had the cart before the
15 horse.

16 In my submission, I agree about your
17 observation. I think the Ministry of the Environment
18 in this case had put the cart before the horse for the
19 reasons I have indicated.

20 It is different, even though you may end
21 up in the same place, even though you may end up with
22 the same result, it is different because by considering
23 the null the way MOE have put it forward, by putting
24 the cart in front of the horse, you end up doing more
25 planning, preparing more documentation in each case.

1 I don't intend to repeat all the other
2 submissions I made in relation to why it was
3 analytically incorrect. You will find those in my
4 submissions in argument-in-chief.

5 The Ministry of the Environment in
6 support of their proposition that the Ministry in fact
7 applies the null alternative referred to one reference
8 from the evidence where Mr. Clark made a comment in
9 Panel No. 10. The reference was to Mr. Clark's
10 evidence regarding roads where there was a discussion
11 about affecting specific values because of the location
12 of a road and the former Chair said:

13 "Well, what about no road at all?"

14 And Mr. Clark said:

15 "That would be considered as an
16 alternative."

17 I submit, Madam Chair, Mr. Clark's
18 comment was not made during a discussion of null and I
19 would suggest to you that if you read Volume 59, pages
20 10,250 to -55 that short exchange between the former
21 Chair and Mr. Clark will be put into context.

22 I would ask you to accept the proposition
23 or that you will see that Mr. Clark was not saying that
24 he would consider the null alternative. He was saying
25 that I will consider avoiding those values by finding a

1 different road location.

2 The next submission that the Ministry of
3 the Environment made in relation to null arose out of a
4 statement found in the class environmental assessment
5 and for this purpose I think it would be worthwhile to
6 turn to the Ministry of the Environment argument, if
7 you have it, at page 77.

8 It is on page 77 where the Ministry of
9 the Environment referred to an excerpt from Exhibit 4
10 and to put this in context we probably should read the
11 entire section. Exhibit 4 stated:

12 "While the objectives and policies
13 arrived at through higher levels of
14 planning and MNR provide general
15 directions of timber management, the key
16 decisions of 'if', 'where', 'when' and
17 'how' timber management will take place
18 are made in individual timber management
19 plans. Since these decisions are made at
20 the management planning level, the
21 preparation of those timber management
22 plans have been made the subject of this
23 environmental assessment."

24 I may have to come back to this
25 particular passage because I think it was referred to

1 in other context as well, but MOE suggested this in
2 some way demonstrates that null is something
3 contemplated as part of timber management planning
4 because there is a consideration of the question 'if'
5 timber management will occur.

6 I submit, Madam Chair, Mr. Martel, that
7 'if', the word 'if' in that section of the EA document,
8 does not mean that you will consider during timber
9 management planning whether some other use is better.

10 'If', the word 'if' in that context means
11 that if there is a demand for wood in the forest
12 management unit, and that's something that you would
13 determine as you have seen - there are tables which
14 indicate what the demands for wood are and they are
15 found in the Timber Management Planning Manual - if
16 there was a demand for wood from the forest management
17 unit, you then proceed to plan where, when and how
18 timber management will take place.

19 That's what the word 'if' is all about in
20 that statement. It is not something which, I would
21 suggest, is probably seized upon and characterized or
22 seized upon as the basis to say the null should be
23 considered or that different uses of land should be
24 considered.

25 Counsel for the Ministry of the

1 Environment made a submission during a discussion about
2 the need to build roads to areas available for harvest,
3 and I don't have the transcript but I believe I have
4 this comment down accurately. Ms. Seaborn said --
5 maybe it was Ms. Gillespie:

6 Just because you have approval across
7 the area of the undertaking does not
8 permit you to operate wherever you want
9 regardless of impacts.

10 Again, she said:

11 Just because you have approval across
12 the area of the undertaking does not
13 permit you to operate wherever you want
14 regardless of impacts.

15 My response to that is, firstly, MNR has
16 never taken the position that it could operate
17 regardless of environmental impacts.

18 Secondly, MNR submits that it can operate
19 in all areas of the undertaking and it can do so in an
20 environmentally sound way and that it does that through
21 normal timber management practices and through special
22 planning in areas of high risk which MNR has identified
23 as being areas of concern and the planning of roads
24 locations, all of those matters being conducted through
25 the application of the mitigation measures that you

1 have heard about, many of which are conducted following
2 the guidance and direction provided in implementation
3 manuals which you have heard about.

4 The question as to what is
5 environmentally sound is obviously what will be
6 determined by the Board.

7 Ms. Seaborn was quite clear, there is no
8 requirement in the Environmental Assessment Act to
9 consider null.

10 Yesterday the Board, my notes say,
11 pressed counsel for MOE - I think that's probably as
12 good a word as any - as to whether MOE wanted a term
13 and condition that null be applied at the local level
14 in the way it had been characterize by Ms. Dahl during
15 her evidence as a planning tool and, if not, why not.

16 MOE have not asked you to put it in their
17 terms and conditions. In my submission, the reluctance
18 to be adamant and serious enough about this issue of
19 null being applied as part of a planning process - you
20 will recall MOE said that they had met the requirements
21 of act, that you could do more - notwithstanding that
22 they still were not asking you to do more in relation
23 to this subject matter, and on that basis alone I would
24 submit that if you were thinking about applying the
25 null or imposing a requirement to have null be

1 considered in planning, as described by Ms. Dahl, that
2 the position of MOE before you should be considered
3 very heavily and should cause you to lean towards
4 rejecting the use of null at the local level as a
5 planning tool, as described by Ms. Dahl.

6 The Board asked Ms. Seaborn how much to
7 say about null in your decision, and it is sort of
8 tongue and cheek because of the subject matter being up
9 so often for discussion, she said: Well, as little as
10 possible.

11 But after that, Madam Chair, you asked
12 Ms. Seaborn what would occur on a bump-up request if in
13 examining what had been done at planning leading to the
14 bump-up request null -- whether null had been
15 considered or not. The response was: MOE would
16 consider how wide and good the Proponent's
17 consideration of the alternatives was, and then she
18 said this:

19 MNR, if they ignored null, they would
20 do so at their peril.

21 If they ignored null, MNR would do so
22 at their peril.

23 Now, that is a matter of some concern.
24 That, in my submission, is an inappropriate position to
25 take.

1 It is inappropriate, Madam Chair, because
2 we have been here at this environmental assessment
3 talking about null and, in particular having regard to
4 this discussion, whether null should be considered at
5 the local level and how.

6 The Ministry of the Environment have not
7 asked you to make it a requirement and perhaps not to
8 say very much about it in your reasons for decision,
9 and what will that result in?

10 It will result in the Proponent every
11 time there is a bump-up having to face the
12 environmental assessment branch and say: Well, you
13 didn't consider null, you did so at your peril.
14 Therefore, you haven't adequately considered
15 alternatives and, therefore, I guess we would better
16 order an individual environmental assessment or to
17 avoid an individual environmental assessment you,
18 Ministry of Natural Resources, go back and consider
19 null.

20 We have made submissions to you before
21 why we feel a consideration of null as described by Ms.
22 Dahl at the local level is inappropriate. We would ask
23 you to accept those propositions and not impose it as a
24 requirement.

25 We also don't believe that the Proponent

1 should be put in the position of having to be at the
2 peril of the environmental assessment's branch view as
3 to the need for null at the local level just because
4 there is no specific term or condition about null.

5 I made submissions to you in my
6 argument-in-chief about the importance of your reasons
7 for decision. If you agree with the propositions put
8 forward by the Ministry of Natural Resources that the
9 application of null and the way that the Ministry of
10 the Environment has characterized it at the local level
11 is inappropriate, then in order to avoid the
12 unacceptable and, I would suggest, improper position of
13 MNR being somehow put into peril if they don't consider
14 the null, that you can send a very strong message to
15 the Minister of the Environment in your reasons for
16 decision.

17 There won't be a term and condition
18 saying null applies if you agree with our proposition,
19 but I submit to you it is important in your reasons for
20 decision to outline for the Minister of the Environment
21 the discussions that have taken place here about null,
22 that you should explain to her the positions of the
23 various parties on this issue and why you feel it is
24 inappropriate and unnecessary for good environmental
25 planning to consider null in the way it has been

1 characterized by the Ministry of the Environment at the
2 local level during during timber management planning.

3 If you do not, then indeed the scenario
4 that Ms. Seaborn presented and pained for you will
5 occur, that people will request bump-ups of timber
6 management plans or parts of timber management plans
7 and they will be confronted with the environmental
8 assessment branch who will say: Well, you didn't
9 consider null and you do so at your peril and,
10 therefore, either they are going to grant an individual
11 EA or they are going to say with a hammer: If you
12 don't consider null we just might give an individual
13 environmental assessment.

14 I don't think I have to say anything
15 more. I think that will be completely improper. I
16 think in fact this is a perfect example of where your
17 reasons for decision or why your reasons for decision
18 are so important.

19 In relation to this issue about
20 bump-ups -- pardon me, not bump-ups, but the comment
21 was made that bump-up requests which were settled --
22 let me step back.

23 In the submissions about null, counsel
24 for MOE made the observation that there have been
25 bump-up requests which were settled because the people

1 who were involved in that went back and looked at wider
2 ranges of alternatives or a wider range of alternatives
3 and that, indeed, in some of those cases the proponent
4 and the party who was requesting the bump-up agreed on
5 a different alternative; that is, one that had not been
6 considered in the original analysis.

7 I have no doubt that that occurs and will
8 continue to occur, but the fact that that has occurred
9 in the past is not evidence that the null alternative
10 was considered in that exercise. Considering a
11 different range of alternatives doesn't mean that the
12 null alternative and the way it has been characterized
13 by the Ministry of the Environment was considered in
14 that exercise.

15 I think I can probably get through the
16 submissions on bump-up in 12 minutes. Let me try. If
17 I don't, then so be it.

18 There was a discussion and, by the way,
19 again this is a discussion of the null -- it is sort of
20 bump-up in the context of null.

21 There was a discussion between Ms.
22 Seaborn and you, Mr. Martel, about starting from
23 "scratch" and this arose out of Ms. Seaborn's
24 clarification that on a successful bump-up; that is,
25 where an individual environmental assessment is

1 ordered, that the undertaking in that environmental
2 assessment should not be affected by the definition of
3 the undertaking in this environmental assessment.

4 Have I got it right this time?

5 We agree with that proposition.

6 By the way, the record should show that I
7 got the nod from Ms. Seaborn.

8 We agree with Ms. Seaborn's basic
9 conclusions in those submissions - and again I tried to
10 get her words down as accurately as I could without
11 looking at the transcript - that you, the Board, should
12 not try to address how MNR should address future
13 environmental assessments; that is, environmental
14 assessments which are ordered as a result of a
15 successful bump-up request.

16 Now, Mr. Martel, during her submissions
17 Ms. Seaborn was making a distinction, and I believe a
18 proper one, between this issue about starting from
19 scratch where, on the one hand, you are looking at that
20 issue about when you start timber management planning
21 at the local level, when you are preparing your
22 five-year plan should you have to start from scratch
23 and in that context what it means is do you really have
24 to redo everything that was done in this environmental
25 assessment all over again every five years during the

1 planning of that timber management operation. That was
2 one situation.

3 The other situation is one of a bump-up
4 request and on a bump-up request there is that request
5 for an individual environmental assessment and if it is
6 granted -- because I have already said the undertaking
7 has to be defined, the purpose has to be defined, all
8 the sections of 5(3) have to be addressed in relation
9 to whatever that undertaking is.

10 So in that case one has to, as a matter
11 of law, on that particular undertaking and it could be
12 a different undertaking than the undertaking which is
13 before you, you do start from scratch. That's what the
14 act contemplates you doing.

15 It is an individual environmental
16 assessment and you start off by saying purpose,
17 alternatives to, choosing the preferred alternative,
18 this is the undertaking.

19 Now, there is a concern, there is still a
20 concern that on a bump-up request that the Minister of
21 the Environment - this is a concern of the Proponent -
22 it is a concern that on a bump-up request that the
23 Minister of the Environment not make the Proponent go
24 through an environmental assessment; in other words,
25 not order an environmental assessment in relation to a

1 matter or an issue which was discussed at this hearing
2 and upon which the Board ruled unless there is some new
3 evidence or there is the encountering of some
4 exceptional situation.

5 In those cases, in either case where
6 there is some evidence or it is indeed an exceptional
7 situation, it is not a subject matter which was
8 addressed or that you heard a lot of evidence about and
9 you made a decision about, if an individual
10 environmental assessment was ordered on such an issue
11 it would be starting all over on that issue.

12 Now, in that case you, as the Board, I
13 would submit, don't have as much control in that matter
14 about -- well, you don't have as much control in that
15 matter as what occurs during a five-year timber
16 management planning exercise. We all have to rely on
17 the reasonable exercise of discretion of the Minister
18 of the Environment.

19 Again, I go back to your reasons for
20 decision. Your reasons for decision are the vehicles
21 through which starting all over again after a bump-up
22 request will be avoided.

23 If you are concerned that the Proponent
24 is not put in a situation where it has to start from
25 scratch, and by that I mean have to reargue, recanvass

1 the same issues which were dealt with here and which
2 you have decided upon and it could be anything from
3 something like sizes of clearcuts, whether pesticides
4 have acceptable or unacceptable human health risks, a
5 whole host of those things, if you are concerned that
6 the Proponent not have to put in jeopardy and have to
7 start from scratch and do all those things again, the
8 way you do that is to make very clear what those issues
9 were and what the positions on the issues were and why
10 you came to the decision that you did.

11 You may not have a specific term or
12 condition about it. The way to avoid having to start
13 from scratch is to do those reasons for decision
14 because the Minister of the Environment when she is
15 confronted with a bump-up request, that is what she
16 should have before her so she can make a reasonable
17 assessment as to whether that is being asked for by
18 that requester is something which was decided here
19 through great length, at great expense and should not
20 properly be recanvassed again.

21 I am sure that your decision will have a
22 very persuasive value, as Ms. Seaborn said, not just
23 for other boards. It should and, I expect, it will
24 have persuasive value to the Minister of the
25 Environment when she tries to decide whether somebody

1 asking for a bump-up is really asking for something to
2 be redone again, to start from scratch on an issue
3 which was canvassed, discussed, assessed and decided
4 upon by this Board.

5 Mr. Martel, when addressing your concern
6 about starting from scratch on bump-ups, I would just
7 remind you of Ms. Seaborn's comments in that regard.
8 You were putting to her some concern about starting
9 from scratch on bump-up requests and she said: Bump-up
10 is a last resort and, as you have heard, there are not
11 a large number of bump-up requests.

12 I ask you to keep that in mind when you
13 are considering the evidence of Ms. Dahl and my
14 submissions in relation to that where I have submitted
15 on behalf of the Ministry that the number of bump-up
16 requests made in relation to timber management and, of
17 course, they are not bump-up requests now, they are
18 designate requests, I said that they are not large
19 having regard to the size of the area of the
20 undertaking, the number of projects which take place
21 over approximately a hundred management units every
22 year.

23 MS. SEABORN: Madam Chair - excuse me,
24 Mr. Freidin - I believe I said there are not a large
25 number of bump-up requests granted.

1 MR. FREIDIN: And I think it is important
2 to note that not a lot -- the fact that a lot of
3 bump-up requests are not granted must be an indication
4 of something.

5 If that is in relation to timber
6 management, and I took her remarks to be referring to
7 timber management, that must indicate that not a lot of
8 bump-up requests are valid.

9 In terms of the absolute number again,
10 you have my submissions as to whether the number of
11 requests, irrespective of whether they were granted or
12 not, were large.

13 Madam Chair, it is twelve minutes to
14 eleven. I can advise you that I am almost finished my
15 EA matters, but I am going to finish in two minutes.

16 So I understand we are going to adjourn
17 until 12:30?

18 MADAM CHAIR: Yes. Thank you, Mr.
19 Freidin. We will be back at 12:30.

20 ---Luncheon recess at 10:50 a.m.

21 ---On resuming at 12:30 p.m.

22 MADAM CHAIR: Good afternoon, Mr.
23 Freidin. We're ready when you are.

24 MR. FREIDIN: Madam Chair, I want to go
25 back to the issue where I was unable to provide

1 references to transcripts and you'll recall that that
2 inability to refer to the transcripts arose in relation
3 to the subject matter of what gets approved when the
4 undertaking gets approved.

5 And, firstly, I had said that Forests for
6 Tomorrow had submitted that in a class environmental
7 assessment the undertaking doesn't get approved, rather
8 the environmental assessment gets approved, and I'll
9 take you to those transcript references in a moment,
10 and I apologize in that I had read one paragraph
11 without carefully reading the second, and I will
12 explain that in a moment.

13 But, more importantly, Mr. Lindgren
14 advises that Forests for Tomorrow's position has always
15 been that an undertaking gets approved at the end of
16 this class environmental assessment and the dispute has
17 been what the undertaking is.

18 And he advises that Forests for
19 Tomorrow's position is that the undertaking which gets
20 approved is the planning process, and you find that at
21 Volume 401 page 68696 to 97.

22 I accept that's that is their position
23 and you have my submissions why we disagree that the
24 undertaking is only a planning process.

25 I would ask you to - if I could just have

1 a moment to read to you why I made the comment I did,
2 the interpretation I did. At page 68697 of the
3 transcript - nothing particular turns on this any
4 longer, Madam Chair, but I wanted to advise you what
5 led me to make the submission that I did initially -
6 Mr. Lindgren had said:

7 "Mr. Freidin tried to be very careful
8 when he was talking about this issue and
9 so did Mr. Bisschop when he was talking
10 about Class EAs during reply evidence.
11 Bolt of those gentlemen talked about
12 approving classes of undertakings as
13 opposed to approving Class EAs which
14 contained planning processes."

15 He goes on, indicated I slipped in my
16 usage of language a couple of times, and he says:

17 "In FFT's view it is the Class EA that
18 gets approved not the activities
19 necessarily that fall within the
20 enumerated class."

21 That's what led me to make the comment I
22 did. Mr. Lindgren did however go on and say more,
23 specifically, Madam Chair, Mr. Martel, it is the
24 planning process in the Class EA that gets approved and
25 there is no specific pre-approval for any particular

1 project in any particular area. So I just wanted to
2 clear that up.

3 It's clear by reference to page 68709
4 that the position of Forests for Tomorrow is that one
5 must look at all of the requirements of Section 5(3) at
6 the local level because on that page, 68709, Mr.
7 Lindgren commented that if you accept the MNR position
8 you will be giving the Ministry effectively carte
9 blanche for all future timber management activities in
10 every stand, in every unit, in every district without
11 ever having MNR demonstrate a need for any of these
12 activities at the project level.

13 Now, I'll comment in relation to that in
14 a moment after I have addressed the situation which
15 arose about my characterization of submissions made on
16 behalf of the Coalition.

17 What I said was that OFAH had submitted
18 that the activities aren't approved as a result of this
19 EA because to do so would be granting the Proponent a
20 carte blanche to carry out timber management without
21 any bump-up provisions. That was the statement which
22 was objected to.

23 No. 1, I shouldn't have used the word
24 carte blanche, that was a word that Mr. Lindgren use,
25 you'll see in a moment that the words Mr. O'Leary used

1 was fate accompli.

2 I probably should have said by granting
3 the Proponent to carry out the activities, you wouldn't
4 have - this is what their submission was, the
5 submission of Mr. O'Leary in essence is, and I will
6 demonstrate this through reference to the transcripts -
7 is that if you approved our approach, the Ministry of
8 Natural Resources' approach, that you wouldn't have the
9 legal ability to impose bump-up provisions. That's the
10 point that I wanted to address.

11 The comment about the characterization of
12 MNR's position, firstly, page 69085. I'm not sure
13 whether it was Mr. O'Leary or Mr. Hanna speaking. The
14 statement is made:

15 "The Coalition has carefully examined
16 the extreme positions being taken by
17 various parties including the Proponent
18 and on this basis and this example the
19 Coalition submits the Proponent is taking
20 another extreme position and that is the
21 fundamental question of the need to
22 harvest in all forest management units is
23 a fate accompli once approval for this
24 class environmental assessment is
25 granted."

1 Well, we don't agree with that and I'll
2 indicate in a moment why. More particularly, in
3 relation to this issue of bump-up, if you refer to
4 Volume No. 1 of OFAH argument at page 15, paragraph 54
5 states as follows:

6 "Similarly the bump-up provisions in
7 all Class EAs are inconsistent with the
8 approval having been given to all
9 projects within the class upon acceptance
10 of the Class EA.

11 "A bump-up under such circumstances
12 would indicate that the Minister and/or
13 the EA Board had withdrawn prior approval
14 for a specific project.

15 "It is noteworthy that once approval
16 becomes final under Section 23 of the
17 Environmental Assessment Act there is no
18 provision for withdrawal of such approval
19 under the Act.

20 "Accordingly...", they go on and say:
21 "...withdrawal of approval for an
22 individual project, if previously granted
23 -- ", and I assume he's referring to
24 granted by this Board:

25 "...would be illegal." In effect, you

1 couldn't do it.

2 "This would be the exact effect of
3 granting a bump-up request for an
4 individual timber management plan if
5 approval of the Timber Management Class
6 EA means approval for individual timber
7 management plans."

8 And similar comments were made at page
9 69157 to 69159 where Mr. O'Leary refers in his view as
10 to the purposes of class environmental assessment and
11 he says, in part:

12 "The purpose is to proceed and obtain
13 approval for a planning process which
14 will avoid that duplication and
15 repetition that I have referred to. He
16 was talking about the duplication and
17 repetition in relation to having to
18 design a planning process.

19 "If MNR's terms and conditions are
20 approved (which in effect means that the
21 planning process level Section 5(3) of
22 the Act does not need to be lived up to
23 and its requirements), the Coalition
24 submits that this would suggest that
25 there would be no need for bump-up, that

1 there had been approval already."

2 The OFAH of course had taken the position
3 that the requirements of 5(3), all of them, apply at
4 the local level, but the point I wanted to make in
5 response to all of that is one which perhaps I could
6 have done without even referring to the transcript, and
7 I wish I just had done it that way.

8 MR. MARTEL: So do I.

9 MR. FREIDIN: The point really I was
10 trying to get to, and I will get to now, is actually a
11 very simple one and, that is, the Ministry of Natural
12 Resources does not believe that it's a proper
13 characterization of an approval of the undertaking of
14 timber management to say somehow that everything is a
15 fate accompli and suggest that there are sort of no
16 controls on how the Ministry of Natural Resources
17 operates at the local level or whether in fact it will
18 carry out timber management in an environmental
19 acceptable way.

20 That obviously is not the case, there is
21 no fate accompli, there's no carte blanche. Approval
22 to proceed will be conditional in that it will be
23 subject to the Proponent meeting terms and conditions
24 of your approval, including following a planning
25 process designed and imposed by the Board.

1 And for the reasons I've submitted, and
2 that planning process should not require the respondent
3 to in fact start from scratch or repeat or meet all of
4 the requirements of Section 5(3) all over again. So
5 that's where that was going.

6 I want to refer to a portion of
7 transcripts at Volume 401 pages 68713 to 714, 713 to
8 714. This was a comment made by Mr. Lindgren in
9 argument regarding the views that certain members of
10 the public may have when they become involved in
11 planning at the local level after an approval if
12 they're confronted with being advised that the need for
13 the undertaking has been resolved somewhere else; i.e.,
14 in this class environmental assessment.

15 Mr. Lindgren says - if I could just have
16 one moment, I want to see if I can shorten this. The
17 section that I would ask you to read is from page
18 68713. If you start on line 11, you read over to the
19 next page ending on line 14, that gives everything but
20 I don't want to take the time to read all of that now.
21 Starting on line 21, Mr. Lindgren says:

22 "If the position of the Ministry of
23 Natural Resources in the future is going
24 to be: Well, we don't have to justify
25 the need for this particular project, we

1 are going to build a road, we are going
2 to access a stand, and do you know why,
3 because something called the Class EA."

4 And then he says:

5 "Something you never even heard about
6 or probably participated in."

7 He said:

8 "Need has been documented at the
9 provincial level so we don't have to
10 look at it now and we are going to go
11 ahead. The best you can do is hope for
12 mitigation in the form of timing or in
13 the form of location."

14 Madam Chair, to say that the Board should
15 somehow provide for an opportunity to consider need at
16 the local level because someone may come along and
17 say -- and be surprised and somehow be justified in
18 saying that's not fair because there's a thing called
19 the Class EA, is something I never even heard about or
20 participated in flies in the face of the whole reason
21 for having class environmental assessments.

22 It disregards the public nature of this
23 class environmental assessment, it disregards the
24 numerous notices to the public in various forms, it
25 disregards the many community hearings that have been

1 held and the efforts made by the Board to ensure that
2 all members of the public had full opportunity to make
3 their views known to you, and it disregards the
4 submissions made by some of the parties here.

5 If they are to be accepted, such as Mr.
6 Hanna, who says: We represent the main stream of the
7 public or the main stream of northern Ontario, we have
8 a large organization. Similar comments weren't made by
9 Forests for Tomorrow, but we are aware of the
10 environmental organizations of which they represent
11 including the Federation of Ontario Naturalists which
12 is a large organization with membership across the
13 province.

14 So I would ask you not to provide for an
15 opportunity to re-examine need at the local level for
16 the reasons suggested in those portions of the
17 transcript.

18 Changing to another subject matter, still
19 staying with EA matters generally. In terms of this
20 discussion about environmental assessment and what the
21 Act means, what other lawyers might do and how keenly
22 they will be awaiting your decision, Ms. Seaborn says
23 that you can be as specific or general as you want to
24 be, and I interpret her to say in terms of your
25 interpretation of the legislation and that you

1 shouldn't feel that you have an obligation to go on and
2 write extensively about the Environmental Assessment
3 Act and what a proper interpretation of it is.

4 I would just like to comment that in a
5 general sense your comment is correct, but that of
6 course does not absolve the Board from its
7 responsibility to provide the legal basis upon which
8 your decision is made or to decide on all the legal
9 issues raised which must be decided upon in order for
10 you to render a decision.

11 Ms. Seaborn also made another comment
12 along these lines and she said that you should link
13 decisions to the facts with some precision, and then
14 she said, but you are not bound to do that.

15 And my response and submission to you on
16 that matter is - and I will be brief - that you are
17 bound to do that to the extent necessary to satisfy the
18 basic rules of natural justice which would expect
19 parties to know, after the case, the reasons for your
20 decision, why you came to your conclusions,
21 particularly why certain positions were rejected or not
22 accepted by you.

23 And the last subject matter in this vein
24 relates to Ms. Seaborn's comments that your ruling will
25 not be binding on other panels of the Environmental

1 Assessment Board but will be persuasive.

2 She indicated that other boards may agree
3 with your decision or your interpretation of the Act,
4 they may disagree with it and, in some cases, they may
5 basically just distinguish the cases before them from
6 this one and say the facts are different, the law isn't
7 necessarily applied, doesn't mean the same thing in
8 these circumstances. MNR agrees with those general
9 propositions.

10 I would suggest to you that the same
11 principle applies to you on how you can deal with other
12 decisions of the Environmental Assessment Board or the
13 Minister, and I bring that to your attention because
14 you have been asked to look at what has happened in
15 other class environmental assessments in terms of what
16 has been done with 5(3) and what has been done with
17 looking at purpose.

18 Those decisions are not binding on you
19 but they are of persuasive value. You examine those
20 issues having regard to the Act and come to your own
21 views. I would note, however, that you are bound to
22 follow court decisions unless there is a proper basis
23 for distinguishing them.

24 The very last item on environmental
25 assessment matters, Madam Chair, that I want to address

1 is to remind the Board of the great amount of
2 experience that Mr. Bisschop has had, not only in
3 timber management planning, but in environmental
4 assessment.

5 Mr. Bisschop, based on the evidence, has
6 been involved in environmental assessments since 1973,
7 during the years leading up to the environmental
8 assessment and that he has held positions doing
9 environmental assessment work for two of the largest
10 proponents in this province since that time, Ontario
11 Hydro and the Ministry of Natural Resources; that he is
12 presently employed not all by himself in the Ministry
13 of Natural Resources but as part of the Planning and
14 Environmental Assessment Branch which is a branch which
15 deals with numerous environmental assessments - as Ms.
16 Dahl's branch does.

17 And I would ask you when you are
18 assessing the weight you should give to Mr. Bisschop's
19 evidence regarding environmental assessment, what good
20 environmental planning is, whether environmental
21 assessment requires environmental assessment-type
22 analysis for everything, for every matter which is
23 discussed, that you carefully review his resume which
24 has been marked as Exhibit 813A.

25 And I'm not going to take the time to

1 review the numerous matters that Mr. Bisschop had been
2 involved in since 1973 in relation to environmental
3 assessment, not timber management, he's been involved
4 in timber management but in relation to how
5 environmental assessment applies to it.

6 He has appeared before the Consolidated
7 Hearings Board on one Hydro case and was qualified to
8 give evidence in relation to environmental assessment.
9 He in fact was involved in the development and
10 application of the environmental planning method used
11 by Ontario Hydro since 1974 in all transmission
12 planning studies. And I'll say no more.

13 And that gets me to the end of EA matters
14 and I would then move on to the secondary, the use of
15 natural and artificial regeneration methods and if I
16 might just have one moment I'd like Mr. Kennedy up here
17 on this matter. So if I can just have a moment.

18 Madam Chair, Mr. Martel, the next topic
19 is the use of natural and artificial regeneration.
20 You'll see the outline, it says I'm going to address
21 that in relation to three subject matters: The
22 importance of site, very briefly discussing the
23 implications of Forests for Tomorrow's term and
24 condition 28(i)(h) which requires the use of net
25 present value calculations, and some references to the

1 costing exercise, particularly to submissions by
2 Forests for Tomorrow made by argument that because they
3 changed their silvicultural prescriptions that somehow
4 the costing exercise is of no value to you.

5 MNR does not agree with that proposition
6 and will be explaining to you why that is the case.

7 In terms of the first matter, importance
8 of site, you have heard that MNR uses various
9 treatments on various sites. We described those in
10 Panels 10 through 12. The reason that that is done is
11 to meet silvicultural objectives.

12 There have been suggestions, particularly
13 in argument, that those techniques are interchangeable
14 and that they are not, as I characterize them in my
15 argument-in-chief, that they're not always true
16 alternatives.

17 The suggestion has been made, and this
18 really is the primary matter I want to address, a
19 suggestion has been made that artificial and natural
20 regeneration are somehow interchangeable and that as a
21 result the investment in artificial is not warranted.

22 What I'm referring to primarily is the
23 argument by Forests for Tomorrow where they review the
24 results of stocking assessments as described in Exhibit
25 552 which were results from a number of Crown

1 management units, I believe nine that were presented by
2 Mr. Waito and Mr. Hynard in MNR Panel No. 11.

3 You will recall that in referring to
4 Exhibit 552E and G, Ms. Swenarchuk for Forests for
5 Tomorrow have referred you to results where higher
6 percentages of stocking were achieved on naturally
7 regenerated sites.

8 In fact on 552E for the conifer working
9 group 87 per cent of the area naturally regenerated was
10 greater than 40, and 7 per cent of the area treated
11 artificially was greater than 40 per cent stocking.

12 And on 552G in relation to free to grow,
13 71 per cent of the area treated naturally was free to
14 grow and 69 per cent of the area treated artificially
15 was free to grow.

16 The reasons those particular numbers and
17 statistics were put before you was to address the
18 question of whether artificial regeneration was
19 superior to natural regeneration or whether the results
20 of artificial regeneration were sufficiently better
21 than natural regeneration so as to justify the
22 additional cost.

23 It is my submission, Madam Chair, Mr.
24 Martel, that making the comparisons between
25 artificially regenerated stands and naturally

1 regenerated stands in that exhibit is of no assistance,
2 I repeat, of no assistance in answering the question as
3 to whether in fact natural is as good, better or worse
4 than artificial regeneration or whether artificial
5 regeneration is required on many sites in the area of
6 the undertaking.

7 I submit to you that the comparison or a
8 comparison of stocking or free to grow results on as
9 between artificial and natural regeneration is only
10 valid if one is comparing results on the same site.

11 You have heard from many witnesses that
12 some but limited sites can be regenerated very
13 successfully or successfully using natural regeneration
14 methods. Those matters were addressed in some detail
15 in our Chapter 1.9 and 1.11.1.

16 You have also heard from numerous
17 witnesses that rich productive upland mixed wood sites
18 are sites where severe competition occurs and if you
19 want to regenerate conifer you have to plant in order
20 to give conifer a jump start on the competing species.

21 On those sites the evidence is that
22 without planting it is expected that conifer
23 regeneration would be extremely difficult to achieve
24 and conifer stocking, as a measure, would be extremely
25 low. If you accept that evidence on those kind of

1 sites, artificial has significant advantages over
2 natural regeneration.

3 Now, Forests for Tomorrow -- I would like
4 to direct you to a couple of paragraphs of Forests for
5 Tomorrow's argument and they are paragraph 551 and 554.
6 551 appears at page 224 of FFT's argument.

7 MADAM CHAIR: Did you say 551, Mr.
8 Freidin?

9 MR. FREIDIN: Yes, Volume 2. I'm going
10 to take a moment to read those two paragraphs because
11 it's those that give me the springboard for a number of
12 submissions. In 551 FFT states:

13 "MNR witnesses have conceded that the
14 maximum investment (planting) does not
15 necessarily lead to better stocking
16 results, rather Ron Waito takes the
17 position that without use of artificial
18 regeneration foresters will not get
19 conifer on the site (e.g. jack pine on
20 richer sites)."

21 It seems to be in agreement with what
22 I've just said. 554 states:

23 "Though FFT specifically asked in
24 Interrogatory No. 5 to MNR Panel 11 for
25 quantitative information to support the

1 statement that tree planting is generally
2 acknowledged to offer the best
3 opportunity for success in achieving
4 prescribed conifer regeneration levels,
5 no quantitative evidence was provided in
6 response and according to Mr. Waito none
7 is available."

8 And then they quote:

9 "MR. WAITO: It is just based on what
10 has been my common belief as a forester
11 and I think what has been the common
12 belief or what is the common belief of
13 most foresters who are practising
14 forestry in Ontario."

15 What did the foresters tell you about the
16 usefulness of comparing stocking and free to grow
17 results? I've indicated to you and characterized what
18 their evidence is and have referred you to our Chapter
19 1.9 and 1.11.1.

20 But because this is such an important
21 matter, Madam Chair, Mr. Martel, I do believe that it
22 is a subject worthy of referring you to some specific
23 portions of the transcript in order to support the
24 proposition that I have made about the importance of
25 artificial on certain sites and the incorrectness, if I

1 can use that word, of comparing stocking and free to
2 grow results from different site types when you're
3 trying to look at natural versus artificial.

4 The first quote comes from Volume 98 on
5 page 16488 to 16490 and this is a question from Mr.
6 Martel and it arose out of this portion of Exhibit 552
7 where it indicated that 69 per cent stocking had been
8 obtained on artificially regenerated sites and 71 per
9 cent had been obtained on naturally regenerated sites.

10 And commencing at line 15, Mr. Martel,
11 you asked:

12 "If the 69 per cent of the area
13 treated artificially is free to grow why
14 for the sake of 2 per cent would you
15 treat?"

16 Mr. Waito, and I'm only taking portions
17 of the transcript, I'm not reading every word. I have
18 given you the pages where you'll find all the words.
19 Mr. Waito says:

20 "It is not really possible to compare
21 the 69 per cent and the 71 per cent
22 because they are on different site types
23 and they are on different areas."

24 Ms. Blastorah asked:

25 "The 69 per cent, the area that was

1 treated artificially, would those site
2 types all be equally appropriate for
3 either artificial or natural or would
4 there be included in there some
5 site types that would be inappropriate
6 for natural?

7 "A. There would be areas that would
8 be inappropriate for natural."

9 He goes on:

10 "You can't compare the two areas
11 because they are on different sites and
12 they are different areas."

13 Mr. Hynard who was on that panel a few
14 pages later in the transcript at page 16492 sort of
15 interjected. It seemed that this question for me, Mr.
16 Martel, was on his mind and he had been thinking about
17 it for a couple pages.

18 And he said:

19 "With respect to your question, Mr.
20 Martel, which was the question of
21 comparison between natural and artificial
22 methods and how they appeared virtually
23 the same or the natural methods in fact
24 showed higher stocking levels overall."

25 He wanted to address that question of

1 yours. He says:

2 "You will recall in my evidence this
3 morning that I said that natural methods
4 were limited by site type, and I presume
5 that these natural methods shown here
6 were conducted on those site types and
7 they showed a good success rate.

8 "Those same natural methods for
9 preferred conifer species, if conducted
10 on tougher sites, those tricky sites that
11 I described, would produce absolutely
12 dismal results, and so that's the reason
13 that they can't be directly compared."

14 Now, Mr. Hynard said:

15 "I'm going to be going on and talking
16 about Forests for Tomorrow's continued
17 criticism notwithstanding that kind of
18 comment because of the lack of what they
19 refer to as quantitative data."

20 Other portions of the transcript that you
21 should look at, that I would direct you to, are Volume
22 106 page 17787 to 17789, that is evidence of Mr. Waito
23 to the same effect. I only want to read you, it's five
24 or six lines, from that entire portion. They appear on
25 page 17787 lines 14 to 21 where Mr. Waito says, this is

1 in cross-examination by Forests for Tomorrow:

2 "I think the important difference
3 between artificial and natural is not so
4 much you get all hung up on volume but on
5 certain site types under certain
6 conditions. It has been my experience
7 that the only way you are going to get
8 conifer there, regardless of what the
9 volume is, is by practising artificial
10 regeneration techniques."

11 If I could just have one moment. In that
12 same volume, Volume 106 commencing on page 17791 to 96
13 there is a further discussion regarding this matter
14 where Mr. Hynard points out to Forests for Tomorrow
15 that when you are looking at different sites, good ones
16 where there's lots of competition and poorer ones where
17 there is not lots of competition, and the type of
18 stocking you could achieve, he said, and I quote:

19 "It is not as simple as if you
20 spend more money shouldn't you get higher
21 stocking."

22 He makes that comment at page 17795, and
23 on page 17795 at the very bottom, starting on line 24
24 and going over to the next page down to line 15, we
25 have the cross-examination which led to the statement

1 in Forests for Tomorrow's argument that you found in
2 paragraph 551 about planting doesn't necessarily lead
3 to better stocking results.

4 There wasn't a cite provided in Forests
5 for Tomorrow's argument so that particular citation was
6 located and, in my submission, it has been taken out of
7 context. Ms. Swenarchuk's question:

8 "So then I take it the evidence of the
9 panel is that -- or just following from
10 what you said, Mr. Hynard, we should not
11 expect that maximum investment which will
12 usually mean planting can reasonably lead
13 or be expected to lead to better stocking
14 results?

15 Mr. Hynard:

16 "Yes, I think that's fair. I think
17 that it doesn't necessarily lead to
18 higher stocking results."

19 Forests for Tomorrow just stopped there.
20 That was the point that they were making. If you read
21 the next paragraph:

22 "And you will recall...", this wasn't
23 reproduced:

24 "...in the results that Mr. Waito
25 presented from Hearst it showed very,

1 very high stocking levels of black spruce
2 natural regeneration and those were on
3 lowland sites of mediocre productivity.

4 Very high stocking standards, much higher
5 than you could obtain by planting trees
6 on a rich and difficult site."

7 I'm suggesting to you that Forests for
8 Tomorrow, notwithstanding the evidence of these
9 foresters, in this particular case have only told part
10 of the story, they have emphasized statements such as
11 'planting does not necessarily lead to better stocking
12 results'. Well, without saying more, in my respectful
13 submission, it takes it out of context and conveys an
14 inaccurate message to the Board.

15 Now, I want to deal with Forests for
16 Tomorrow's cross-examination and their argument that no
17 quantitative data was in fact presented by these
18 foresters or by any foresters to support or justify the
19 statement that on some sites you have to use
20 artificial, that if you use natural on some of those
21 tricky sites your results will be dismal.

22 And they are suggesting to you, Madam
23 Chair, Mr. Martel, that without that quantitative data
24 you should in some way not accept the evidence of those
25 foresters that those are the facts.

1 And I would submit to both of you as
2 strongly as I can that the lack of quantitative data,
3 assuming you find that there is a lack of quantitative
4 data, does not mean in any way that there is no
5 evidence of the fact that on some sites artificial
6 regeneration is necessary in order to obtain acceptable
7 levels of conifer regeneration.

8 As Mr. Greenwood pointed out in Volume
9 107 at pages 17939 to 17942, he's saying the only way
10 you would have quantitative data of the type that was
11 being referred to by counsel for Forests for Tomorrow
12 on the cross-examination was to take one of those
13 tricky sites and plant part of it and let part of it
14 renew naturally and do that across a whole number of
15 sites and come forth and put forth the quantitative
16 data.

17 In my submission, the evidence is such
18 that it would be unreasonable, it is not necessary to
19 do that kind of, or to provide that kind of data to
20 this Board for the Board to accept the evidence of the
21 many, many foresters who have described to you the
22 difficulties about competition on these rich sites and
23 the distinctive advantages of artificial regeneration
24 in those circumstances.

25 During her submissions to you, Ms.

1 Swenarchuk said that MNR is not providing you with
2 comprehensive data about regeneration results in
3 Ontario, nor comparative data regarding success rates
4 for artificial versus natural regeneration, or a
5 breakdown of the techniques between the two. Then she
6 went on and makes this interesting observation.

7 "Nevertheless, conventional wisdom is
8 that you get better results from
9 artificially regenerated sites."

10 Now, firstly, I have three things I want
11 to say about that comment.

12 MR. MARTEL: That last comment?

13 MR. FREIDIN: Conventional wisdom is that
14 you get better results from artificially regenerated
15 sites.

16 I have three comments I would like to
17 make. Firstly, she has mischaracterized the
18 conventional wisdom somewhat because the conventional
19 wisdom is that on certain sites in certain conditions
20 artificial will provide better results than natural,
21 and in some of those situations only artificial
22 regeneration will give you acceptable results.

23 Secondly, having said that, I submit that
24 conventional wisdom based on the professional judgment
25 and experience of the foresters which appeared before

1 you is a reasonable basis to make a finding of fact in
2 relation to this subject matter of artificial versus
3 natural upon which it would be reasonable for you to
4 base your decision.

5 The third one is sort of tied up with
6 that, that it is - and a repeat of what I said before -
7 it is not necessary that conventional wisdom be
8 supported by quantitative data either to be evidence or
9 to be reliable evidence.

10 There was some discussion about the 40
11 per cent minimum stocking standard during Forests for
12 Tomorrow's argument and the suggestion was that 40 per
13 cent somehow was called a minimum and that meeting that
14 was really an indication of unacceptable timber
15 management.

16 I would just ask you to refer in that
17 regard to Volume 107 pages 17921 to 28. That is part
18 of the cross-examination of Mr. Waito again in relation
19 to this Exhibit 552E where they were talking about
20 comparing stocking results between artificial and
21 naturally regenerating stands.

22 Again I will only highlight for you a
23 portion of that. The portion that I'm going to
24 highlight commences on page 17923 at line 23 and runs
25 over to page 17925 line 20. Basically at the beginning

1 of that it just sets the stage that what they're
2 talking about is Exhibit 552E, and Mr. Waito says, and
3 this is cross-examination by Ms. Swenarchuk:

4 "The important number is the 40 per
5 cent.

6 "MS. SWENARCHUK: Q. Well, are you
7 satisfied as a professional, Mr. Waito,
8 when you are conducting regeneration
9 processes to consistently obtain only the
10 minimum acceptable standard?

11 "MR. WAITO: A. I am satisfied as
12 a professional if I achieve the minimum.
13 I actually don't particularly like the
14 term minimum because, as I tried to
15 portray or describe in Exhibit 551, that
16 that minimum standard, that minimum
17 figure actually represents a fairly high
18 standard of failure, if I can
19 characterize it that way.

20 "So if we were consistently hitting 40
21 per cent we are meeting our objective."
22 She goes on:

23 "Are you in a position to assure us
24 that the consistent achievement of the
25 minimum stocking level is going to

1 satisfy the wood supply requirements of
2 the forest production policy?

3 "A. Well, I'm not in a position to
4 assure anything. I think the standards
5 have been developed on the basis of an
6 understanding of what 40 per cent
7 stocking describes. As Mr. Hynard said
8 yesterday, 40 per cent stocking...", and
9 this is probably the most important part:

10 "...40 per cent stocking will ensure that
11 that working group is maintained and will
12 produce a successfully stocked and
13 regenerated stand."

14 And again this issue is addressed in more
15 detail in our Chapter 1.9 and 1.11.1.

16 Again on this issue of artificial versus
17 natural and whether artificial is superior, that being
18 the way it was characterized by Forests for Tomorrow in
19 their argument, the submission was made by Forests for
20 Tomorrow that the only long-term plantation results are
21 SOARS and Mr. Marek's plantations.

22 And, having said that, Forests for
23 Tomorrow have suggested that the evidence regarding
24 those areas demonstrate that artificial regeneration
25 does not produce results which merit the investment in

1 artificial regeneration.

2 Two responses. Firstly in relation to
3 SOARS. SOARS 1 and SOARS 2 looked at silvicultural
4 practices which took place in the 1960s and early
5 1970s. I believe Ms. Cronk gave you the reference for
6 SOARS No. 1. I apologize I don't have it here for you
7 now. SOARS 2, which is Exhibit 553, states on page 2,
8 and I quote:

9 "The data for this study relates only
10 to planting projects of 1976 and earlier
11 and seeding projects of 1971 and
12 earlier."

13 And you have Ms. Cronk's submissions and
14 you are aware of the evidence regarding the
15 improvements which have been made to silvicultural
16 practices since those years.

17 In relation to Mr. Marek's plantations,
18 the suggestion has been left with you that Mr. Marek's
19 plantations have failed, he said they had failed. And
20 because those plantations that he established or
21 attempted to establish -- in fact, I shouldn't say
22 attempted, which he did establish, were established
23 long enough ago that now that he has come to the
24 conclusion that they have failed you should accept the
25 proposition that artificial regeneration isn't worth

1 the investment.

2 I would ask you to look at a number of
3 portions of the transcript which will demonstrate that
4 when Mr. Marek gave evidence about his plantations
5 failing he was talking about those monoculture spruce
6 plantations that he was attempting to establish in the
7 Limestone Lake and Tyrol Lake area in the Lake Nipigon
8 area.

9 Those were areas where he was expecting a
10 considerable increase in the volume over which one
11 could obtain by practising artificial regeneration the
12 way it's done now. And, therefore, when he said they
13 had failed, they hadn't lived up to his extremely high
14 expectations of what he thought he should get from
15 carrying out European-style intensive management.

16 And you have heard Mr. Marek say quite
17 clearly that the kind of intensive management that he
18 talked about, that European-style where you try to
19 get -- that he tried on those Limestone Lake, Tyrol
20 Lake plantations, was much more intensive than what the
21 Ministry of Natural Resources and the Industry referred
22 to when they say they practise intensive management on
23 some sites.

24 You will see from a review of the
25 transcript -- I don't think I need go on any further.

1 I will give you the references. And I apologize, I
2 don't have the volume numbers, but pages 46588 to 91 is
3 a cross-examination of Mr. Marek by Ms. Cronk and, in
4 particular, 46591 where the question was:

5 "And is it in that context that you
6 indicate that you were not satisfied with
7 your tending efforts on Limestone Lake?

8 "A. That's correct.

9 "Q. And Tyrol Lake.

10 "A. Correct."

11 And it was after going through these
12 particular monocultures. 46650 to 46652 you'll see
13 that, as I would characterize it, perfection was the
14 benchmark against which Mr. Marek was describing
15 whether he failed or he succeeded.

16 And you should also look at the
17 re-examination of Mr. Marek by his own counsel, Ms.
18 Swenarchuk, at 48212 to 213 where in re-examination he,
19 in my respectful submission, supports the proposition
20 which I've just made to you.

21 Can I just have one moment, Madam Chair.
22 I would like to move on to the next subject matter
23 which is on the list here, net present value, NPV.
24 And these submissions will, I assure you, be brief,
25 although the discussions and the wranglings about them

1 were repetitive and long.

2 Mr. Martel, during the argument of
3 Forests for Tomorrow, you stated that - and I think
4 I've got you down fairly accurately - if you want the
5 best supply you need a mix of artificial and natural
6 and that is contrary to your opinion, and you're
7 speaking to Ms. Swenarchuk or to Mr. Lindgren, I don't
8 recall, and the response was:

9 "MS. SWENARCHUK: We are looking for a
10 change in emphasis. We have not said
11 there will be no artificial regeneration,
12 but more deliberate treated areas for
13 natural."

14 In my submission the Forests for Tomorrow
15 term and condition, and their entire case for that
16 matter, but particularly their term and condition is
17 not consistent with the statement made by Ms.
18 Swenarchuk whether by design or whether inadvertently.

19 The term and condition that I'm referring
20 to is term and condition 28(i)(9h) and maybe we should
21 spend this last -- if you have that with you we should
22 take a look at it. 28(i)(h) states, beginning at the
23 top:

24 "When identifying or evaluating or
25 selecting silvicultural ground rules, MNR

1 shall ensure that approved silvicultural
2 prescriptions will...", then it says:

3 "...require the use of extensive
4 silviculture on all sites and stands
5 capable of natural regeneration of
6 primary coniferous species."

7 Here's the important part:

8 "However, intensive silviculture may
9 be used on sites where intensive
10 silviculture is economically feasible in
11 that present net worth of all direct
12 costs and returns is positive."

13 S this particular term and condition is
14 addressed in MNR's argument in Chapter 1.11 at page 344
15 to 348. You will note, if you just read the term and
16 condition, the only circumstance in which intensive
17 silviculture is permitted is where present net worth of
18 all direct cost and returns is positive. That's what
19 it says. In my submission there is no question that
20 that is what it says.

21 The evidence of Dr. Muller called in
22 Forests for Tomorrow's Panel 7 stated that net present
23 value should not be the sole decision-making criteria.

24 You will find the references for all of
25 this in those sections of Chapter 1.11 that I referred

1 you to. As I have stated, Forests for Tomorrow's term
2 and condition 28(i)(h) does make it the sole
3 decision-making criteria.

4 And you will recall the evidence both in
5 response to questions of you, Madam Chair, and maybe
6 Mr. Martel as well, of Mr. Benson and the evidence of
7 Mr. Hynard that there would be very, very few cases
8 where one would get a positive net present value when
9 you are assessing artificial regeneration being used on
10 a site and, therefore, there would be very few cases
11 where artificial regeneration would be permitted as a
12 result of the application of this term and condition.

13 And although the citations are found in
14 Chapter 1.11, I will refer you to the more pertinent
15 ones now. Mr. Benson at Volume 280, page 50221 to 222;
16 and Mr. Hynard at Volume 78, page 13074 to 79; and also
17 Exhibit 603C which was one of the witness statements in
18 Panel No. 12 I believe, pages 16 and 14.

19 So, Madam Chair, I'm obviously, because
20 of the submissions I've made about artificial versus
21 natural, asking you to reject that particular term and
22 condition and by not mentioning the other ones I'm not
23 saying you shouldn't do the same with those, but that
24 one makes the practice of silviculture the way it's
25 practised in this province almost an impossibility.

1 Madam Chair, I'm going to be moving on to
2 the issue of the costing exercise. I wonder whether
3 this is an appropriate time for a break.

4 That will take about 15 or 20 minutes.

5 MADAM CHAIR: That's fine. Let's take
6 our afternoon break.

7 ---On recessing at 1:35 p.m.

8 ---On resuming at 2:00 p.m.

9 MADAM CHAIR: Please go ahead, Mr.
10 Freidin.

11 MR. FREIDIN: Thank you. The last item
12 in relation to natural and artificial regeneration
13 methods is the costing exercise, if you recall, was an
14 exercise which involved not just Ministry of Natural
15 Resources but a number of the other full-time parties
16 including Forests for Tomorrow.

17 The reason I wanted to speak about this
18 was because Ms. Swenarchuk suggested in her
19 submissions, and you see this in their written argument
20 at page 230 at paragraph 571, that they're suggesting
21 that the results of the costing exercise is really of
22 no assistance to the Board any longer for two reasons.

23 The first reason they give is that their
24 silvicultural prescriptions have been significantly
25 changed from those utilized in the costing exercise and

1 that both parts of the exercise are based on
2 questionable data and modeling techniques that make the
3 forecasts invalid.

4 You'll recall it's in relation to that
5 second matter that they're relying on the comments made
6 by Mr. Benson in that portion of the report where the
7 committee members had an opportunity to indicate their
8 personal views on certain matters.

9 It's the submission of the Ministry of
10 Natural Resources that an examination of the material
11 produced by that group, the group that did the costing
12 exercise, shows quite clearly that the main ingredients
13 in the raised costs of the FFT scenario over the
14 present practice scenario remain, or will remain
15 notwithstanding the changes to FFT's silvicultural
16 prescriptions.

17 I will refer you to specific portions of
18 the terms and conditions and indicate to you -- well,
19 first of all, before I do that, I believe the three
20 main ingredients which led to the raised costs in the
21 first place were: No. 1, the elimination of the aerial
22 application of herbicide, and the committee did provide
23 for some ground applications of herbicides; secondly,
24 increased road and layout costs, especially that
25 associated with the strip cutting in black spruce; and,

1 thirdly, a requirement to use tree-length logging on
2 sites where the depth of soil is less than one metre.

3 You'll find the references to those
4 ingredients and how they were addressed in a brief way
5 on the following pages of the costing exercise which is
6 Exhibit 2226, in relation to the three items I just
7 gave you, they would be pages 53, 46, and 48 to 49
8 respectively.

9 I don't think we have to go to Forests
10 for Tomorrow's terms and conditions, but Forests for
11 Tomorrow's term and condition 96 indicates that with
12 respect to the aerial application of herbicides there
13 is no change in the FFT proposal.

14 Term and condition No. 30 indicates that
15 with respect to full-tree harvest there is no change in
16 the FFT proposals.

17 FFT condition 69 still requires marking
18 of all boundaries, so extra layout costs of some nature
19 would still be incurred.

20 And FFT condition 28 has removed the
21 requirement for strip cutting of black spruce and,
22 therefore, one of the items that they have taken out
23 will affect one of the costs which was considered and
24 that was the road costs.

25 You will recall the evidence in that

1 regard was the committee came to the -- Well, I don't
2 think I want to take the time to characterize
3 everything the committee said.

4 I would submit, however, that they would
5 still require many small clearcuts, FFT's silvicultural
6 prescriptions. You recall that they have a hundred
7 hectare limit on the size of clearcuts, they're
8 providing for a range of small cuts, the reporting
9 requirements if you're going to exceed the hundred
10 hectares.

11 It's my submission that with the smaller
12 cuts some of the extra road costs that are associated
13 with the smaller strip cuts would still be incurred but
14 not as much, I can't tell you how much in the
15 circumstances in which the change occurred to the term
16 and condition.

17 I would submit to you that the best
18 evidence you have about the cost associated with the
19 FFT regime is still found in the costing exercise, and
20 I would refer you to comments by Mr. Waito at pages 64
21 to 65 and page 67 of Exhibit 2226 where he speaks about
22 the reasonableness or the degree of confidence he had
23 as to the manner in which they went about costing the
24 various items.

25 In terms of the issue of roads, on page

1 230 of their argument, paragraph 523 FFT have said that
2 the committee did not determine road maintenance and
3 road construction costs.

4 That Madam Chair, Mr. Martel, is not
5 correct. The committee did estimate the road
6 construction costs. They did not make an estimate of
7 the cost of maintenance and reconstruction. You will
8 find in Volume 388, pages 66890 to 91 the evidence in
9 support of that proposition.

10 I would also direct your attention to the
11 costing exercise at pages 17 to 18 in that regard.
12 The matter dealt with at that latter portion was in
13 relation to the maintenance and reconstruction costs.

14 In relation to the issue of road
15 maintenance and reconstruction costs you have the
16 evidence of Mr. Waito, not the committee, but Mr. Waito
17 who indicated that in his view the cost of the
18 maintenance and reconstruction are likely highly under
19 the FFT regime.

20 He stated, if you have more roads you
21 will have to maintain more roads; if you have to use
22 roads longer, you will have to do more reconstruction.
23 The committee could not come up with an agreed cost, so
24 they did not factor this item into the equation.

25 You recall there was an agreement that

1 the roads under the FFT regime would have to be built
2 in half the time for the same area as it would have to
3 be constructed using present practice because of the
4 smaller cuts and breaking up the cuts.

5 And Mr. Waito's evidence was that that
6 would result in higher cost of maintenance and
7 reconstruction. So you'll find his full answer in that
8 regard at Volume 388, pages 66963 to 964.

9 It's interesting to note in Forests for
10 Tomorrow's written evidence page 231, paragraph 573
11 they seem to agree with this proposition with regards
12 to roads because they state, and I quote:

13 "The possibility of larger cuts was
14 not factored into this costing exercise.
15 If larger cuts were allowed costs,
16 including the road costs under the FFT
17 regime, would be reduced."

18 Ms. Swenarchuk was critical of the
19 costing exercise because one of the reports that was
20 relied upon by the committee was the Ketchinson report,
21 which was a report dealing with road construction and
22 it was done in the late 1970s.

23 The criticisms in that regard can be
24 found in the written argument of FFF at page 231,
25 paragraph 576. You will also find it in the transcript

1 out of the oral argument of FFT at Volume 402, page
2 68901, and at that particular portion of the transcript
3 Ms. Swenarchuk stated:

4 "It's the position of Forests for
5 Tomorrow that the Board is entitled to
6 draw an inference regarding the party's
7 failure to produce such important
8 evidence."

9 She's talking about more up-to-date
10 evidence than the late 1970s in the Ketchinson report.
11 She said:

12 "It's the position of FFT that the
13 Board is entitled to draw an inference
14 regarding the party's failure to produce
15 such important evidence and, had it been
16 produced, it would not have supported
17 their position; that is, the position
18 that modified cutting raises wood costs."

19 She's asking you to do what often happens
20 in some cases, sort of a legal principle: If you don't
21 call some evidence which would probably be favourable
22 somehow that the court should take an adverse inference
23 and say: Well, obviously, if you would have called it
24 it would have been against you. You would have called
25 it otherwise. Well, MNR submits that the Board is not

1 entitled to draw any such inference.

2 Firstly, Mr. Lindgren was asked directly
3 about the Ketchinson study by Mr. Lindgren in Volume --
4 I'm sorry Mr. Waito was asked by Mr. Lindgren. If it
5 was Lindgren asking Lindgren the answer would be right
6 every time.

7 Transcript Volume 388, page 66896, Mr.
8 Lindgren asked Mr. Waito:

9 "It is my understanding that the
10 Ketchinson work has been criticized as
11 being old and too high. Have you heard
12 that criticism?

13 "A. No, I have not."

14 Just stopping there, we have a suggestion
15 from Mr. Lindgren to that effect. The only evidence
16 that you have is that no one is aware of such
17 criticism. Mr. Waito was on the committee and he says
18 he has not heard this criticism before.

19 If the Board is to draw any inferences
20 they might note that Mr. Lindgren did not ask Mr. Waito
21 whether MNR was asked to produce more up-to-date
22 information.

23 So what did the committee actually say
24 about this item, this Ketchinson study. I want to make
25 three points.

1 Firstly, when they came to use the
2 Ketchinson study which set out a range between \$98 and
3 \$383, leaving aside the pennies for the extra cost
4 associated with the strip cutting, they chose the
5 mid-range of \$180, they didn't use the high number,
6 that's No. 1.

7 No. 2, Mr. Benson was given the
8 opportunity to make certain comments and he did, but
9 his comments do not say that the information in the
10 Ketchinson study was old and too high as suggested by
11 Mr. Lindgren to Mr. Waito.

12 And, thirdly, I think it's common sense
13 to suggest that there are very few things that cost
14 less now than they did in 1979. If the Board is to
15 draw any inferences you should draw the inference that
16 those costs would be higher not lower.

17 Now, there was an associated criticism by
18 Forests for Tomorrow, which you will find on page 231
19 of their written argument at paragraph 575, and that is
20 that a figure of \$90 had been used to pay at least one
21 FMA holder to compensate them for the extra cost
22 associated with strip cutting and the committee used
23 180. So the suggestion was: Well, you're not being
24 fair to Forests for Tomorrow, you picked the middle
25 range, 180, but you only paid \$90 when you were

1 compensating an FMA holder.

2 Well, again, I think that takes things a
3 little out of context and I would refer you to Mr.
4 Waito's evidence in relation to that particular
5 criticism found at Volume 388, page 66897 where he
6 indicated that the \$90 figure was not intended to cover
7 the cost of road construction, rather it was intended
8 to cover the cost of some layout and some other costs.
9 So the number was lower because it didn't include the
10 same work.

11 The next area that FFT are critical of is
12 found in paragraph 578 of their argument where they
13 make the comment as follows:

14 "The cost was not considered or
15 modelled as part of the wood supply
16 exercise."

17 And Mr. Waito's statement to the effect
18 that the average cost under FFT scenario 1 would be 20
19 per cent greater and a hundred per cent greater under
20 scenario 2 are his own and not those of the committee.

21 It is true that the evidence regarding
22 the percentages by which the various scenarios would
23 differ was the personal comments of Mr. Waito, however,
24 the statement that:

25 "The cost was not considered or

1 modelled as part of the wood supply
2 exercise." is wrong.

3 There was considerable data in relation
4 to that matter and it forms the bulk of the material at
5 the end of the report.

6 There's a whole series of computer
7 printouts and Mr. Waito explained to Mr. Lindgren under
8 cross-examination that in doing the modeling the cost
9 information was incorporated into the model and the
10 computer printouts were produced and he said that he
11 used that information to make the comments about the
12 cost comparison of the various scenarios.

13 He agreed that the committee chose not to
14 bring the cost part of it into the main body of the
15 report but the costing was done, and you have evidence
16 of Mr. Waito who was on that committee as to what it
17 meant from his perspective. You'll find that evidence
18 in Volume 388 at pages 66916.

19 The next criticism by Forests for
20 Tomorrow is found on page 232 in paragraph 579 where
21 Forests for Tomorrow state, and I quote:

22 "The committee did not consider the
23 overall benefits of FFT's scenarios
24 which resulted in a greater proportion of
25 the area harvested being treated."

1 Well, the response to that is that you'll
2 recall that there was no cost ceiling on the FFT
3 regime.

4 There's no question that without a limit
5 on the amount of money one can spend on the one hand,
6 the FFT scenarios, and a limit on the amount of money
7 one can spend in the present practice estimate, on the
8 other, it would come as no surprise that more area was
9 treated under the FFT scenarios.

10 So a comparison of the amount of area
11 treated on one case and the other, again, is comparing
12 apples and oranges and really isn't a fair comparison
13 of one approach to management as opposed to the other,
14 particularly having regard to the reality that there
15 are limited amounts of money. Putting it another way,
16 there are budgets within which one must in fact
17 practise silviculture whether it's artificial or
18 natural regeneration which is being used.

19 The committee did comment on the
20 differences in terms of costs and in the first part of
21 their report - and I would just refer you to page 32 of
22 the costing exercise where you'll find that - in
23 summary, the committee found that spending 20 per cent
24 more money would provide 15 per cent -- actually I
25 don't think I'll give you the numbers, I'm not sure

1 they're a hundred per cent...

2 The next item that the Forests for
3 Tomorrow were critical of was how the committee
4 allegedly disregarded the use of the ground application
5 of herbicides. You'll find that criticism in paragraph
6 580 of FFT's argument. Paragraph 580 states, and I
7 quote:

8 "The committee assumed that FFT's
9 treatments require manual tending and did
10 not consider that herbicide use other
11 than aerial spraying is permitted under
12 the silvicultural prescriptions preferred
13 by FFT."

14 So they're saying we, FFT, provide for
15 the use of the ground application of herbicides and
16 they're suggesting in this paragraph of their argument
17 that that was not considered in the costing exercise.

18 Madam Chair, that statement is incorrect.
19 I will first refer you to the transcript reference
20 where my proposition that it is incorrect will be
21 found, that's transcript Volume 388 pages 66921 to 924,
22 and this matter is also discussed in the report itself
23 at page 53.

24 The transcript reference again is to a
25 portion of the cross-examination of Mr. Waito by Mr.

1 Lindgren, and it is somewhat lengthy, but I will try to
2 abbreviate it for you.

3 Mr. Waito says, in part:

4 "I can take you to a portion of the
5 report where we have actually reflected
6 that (i.e. the herbicide application from
7 the ground)...", and he refers to page 54
8 of the costing exercise.

9 And when you go to that page of the
10 costing exercise you may recall, Madam Chair, Mr.
11 Martel, that we have a number of tables where there are
12 different regimes across the top of the chart A, B, C,
13 and D and when you get over to the D column and you go
14 down there you will see under the heading of tending
15 they have reduced the cost of applying herbicides --
16 pardon me, of tending from \$568 a hectare, which was
17 the amount for the cost for the application of chemical
18 herbicides at the time site preparation was done --
19 just hold on one moment, Madam Chair.

20 Yes, it included where there was site
21 preparation by ground application it was \$568 a
22 hectare, and when they got down to the tending portion
23 in regime D rather than costing manual tending they
24 costed the ground application of chemical and it's
25 reflected by indicating \$460 per hectare for the ground

1 application of herbicides as opposed to a higher cost
2 which would have been there had it been manual tending.

3 And in any event, Madam Chair, you have
4 the evidence regarding the relative costs of tending,
5 whether it be manual, ground application of herbicides
6 or the aerial application of herbicides. You find that
7 in our argument in Chapter 1.9 and 1.11.1.

8 The evidence is clear that the aerial
9 application of herbicides is much less costly than
10 either the ground application of herbicides or the
11 manual tending.

12 The next subject matter that FFT were
13 critical of is in relation to comments about wood
14 supply and what would the effect be of the various
15 scenarios on wood supply.

16 The criticism can be found in their
17 argument at page 233 paragraph 582. In that paragraph
18 they indicate that despite Mr. Callaghan's conclusion
19 that the FFT results would result in more hardwood than
20 the present practice alternative, summaries at page 200
21 and 202 -- pardon me, 200-202 of the report indicate
22 softwood content of 90 per cent for FFT regime 1; 80
23 per cent for FFT regime 2; and 80 per cent for the
24 present practice alternative. FFT cite as authority
25 for that proposition Volume 388, page 66925 which is

1 some of the evidence of Mr. Callaghan.

2 But I would ask you to recall the
3 evidence of Mr. Callaghan, which you will find at pages
4 66926 to -928, where he indicates that in the cost
5 exercise FFT's 90 per cent conifer for scenario 1 is
6 mostly balsam fir, and MNR's present practice, 80 per
7 cent conifer, has a higher level of black spruce;
8 that Mr. Callaghan's estimate when he looked at effects
9 on wood supply as a result of applying the various
10 scenarios the yield information that he used came from
11 60 management units not one; that Mr. Callaghan's
12 calculations break the species composition down into
13 six or seven major working groups, in other words, he
14 distinguished between balsam fir and black spruce and
15 those sorts of things which are important matters to
16 consider, whereas the costing exercise looked only at
17 conifer working groups as a package.

18 And you will recall his evidence, Mr.
19 Callaghan's evidence in MNR reply Panel No. 5 that by
20 applying the FFT scenarios based on the methodologies
21 that he applied using the same funding levels, not
22 giving FFT unlimited funds, but at the same funding
23 level that there was a significant difference in the
24 conifer regeneration that could be expected, that one
25 would expect significantly less conifer regeneration

1 applying the FFT approach in comparison to present
2 practice.

3 Forests for Tomorrow were also critical
4 of Mr. Callaghan's evidence because they say he
5 arbitrarily picked 60 years as the point in time to
6 look and see how much had been regenerated and of what
7 in relation to the FFT scenarios and present practice.
8 And they suggest -- this criticism is found in their
9 argument at page 233 paragraph 583, and it states:

10 "He...", meaning Mr. Callaghan.

11 "...utilized 60 years as a point in time
12 to look back on the forest conceding that
13 was an arbitrary number. Since with
14 extensive silviculture maximum MAI (mean
15 annual increment) will generally occur at
16 periods greater than 60 years, he did not
17 use the figure that maximized the annual
18 increment for the FFT scenarios."

19 So the suggestion here is that somehow
20 Mr. Callaghan cooked the books by picking 60 years.
21 When you use natural regeneration it takes longer to
22 get the same results than it might if you were using
23 artificial.

24 Mr. Callaghan responded to that criticism
25 at least twice, once in Exhibit 2260 which is the

1 answer to FFT - you'll find the answer to FFT
2 Interrogatory 14 to reply Panel 5 - and again during
3 cross-examination at Volume 388 page 66928.

4 Mr. Callaghan indicated in the
5 interrogatory that 60 years was simply chosen as an
6 arbitrary time for all management regimes in order to
7 allow a direct comparison, and he indicated the 60-year
8 projection does not maximize the volume for any of the
9 three options presented nor was that the intention of
10 the analysis.

11 In cross-examination Mr. Callaghan was
12 asked again whether maximum MAI would occur later in
13 extent to the managed stands, and I quote, here's what
14 he said in Volume 388:

15 "Yes, but you would also have the
16 benefit for those areas on a shorter
17 rotation...", referring to the
18 intensively managed stands,

19 "...you will have the benefit for those
20 areas on a shorter rotation, or maybe
21 renewing them one and a half times. So
22 that if you had a 70-year rotation for a
23 plantation and a hundred year rotation
24 for an extensively managed area, you'd
25 get the growth from that 70 years plus 30

1 years on top of that.

2 "So taking 60, which is a pre-rotation
3 age for all of them, that's both
4 extensive and intensive, puts them more
5 on an equal footing and simplifies the
6 math. And, as we have learned through
7 this hearing, the timing within which
8 regeneration occurs as a result of your
9 regeneration efforts is an important
10 matter to be considered when you are
11 carrying out timber management
12 objectives; you are carrying out
13 silviculture to achieve objectives."

14 And the last item that I would refer to
15 is not so much -- well, FFT argument page 233 paragraph
16 584 to 585 where they are critical about the fact that
17 present net worth was not utilized in the costing
18 exercise. I just commend that to you. They refer to
19 NPV.

20 In my view, it supports the proposition -
21 this is at page 233 paragraph 584 to 785 - the comment
22 there supports the proposition that I made to you
23 before that they really don't expect there to be very
24 much artificial regeneration going on if you use NPV
25 calculations.

1 Madam Chair, I'd like to move on to the
2 subject matter of clearcut silvicultural system,
3 and I'm going to do this in the reverse order from that
4 which is shown on the outline I provided to you this
5 morning.

6 I'm going to deal with the issue of
7 contiguity first. You'll recall on this issue that
8 counsel for Forests for Tomorrow described a number of
9 situations where there were contiguous cuts, and she
10 did that for a number of management units.

11 You may recall that what she did -- one
12 of the things she did, she brought the map up to you -
13 I never did see it - she drew a yellow border around
14 something and said there was a contiguous cut, 20,000
15 hectares.

16 But you recall she went through a number
17 of examples referring to different management units and
18 was submitting to you that in Mr. Benson's clearcut
19 exercise, which is really described in Exhibit 1604B,
20 which is the second volume of FFT's Panel No. 5, Mr.
21 Benson went through and did a clearcut exercise, and
22 what she did in effect was to refer to some or all of
23 them, I don't know, but many of the management units
24 that Mr. Benson had made calculations on, and said:
25 Here's an example of a contiguous cut of 7,000; here's

1 one of up to 50,000, here's one of 4,000, they were
2 various sizes.

3 The suggestion being made - attempting to
4 get you to accept - that, firstly, large contiguous
5 cuts are still occurring; and, secondly, she also used
6 that in a way to set up her discussion of the
7 undertaking which was provided to the Board near the
8 end of the hearing and which was explained by Mr.
9 McNicol, the one about which indicated what size of
10 clearcuts are presently being put on the landscape as a
11 result of application of the moose habitat guidelines.

12 And there may have been some suggestion
13 left with you - and I will review some of the evidence
14 very briefly - that somehow in preparing that
15 undertaking there had somehow been some improper motive
16 or ability or attempt to mislead the Board, because
17 you'll recall she got into a discussion about how the
18 identification of what was a contiguous cut and what
19 wasn't was different when one looked at the clearcut
20 exercise methodology in comparison to the methodology
21 that was used on the moose habitat guideline matter and
22 explained by Mr. McNicol.

23 I want to highlight a number of
24 differences between those two exercises, between the
25 clearcut exercise and the work which was required to

1 answer the undertaking regarding the application of the
2 moose habitat guidelines.

3 Firstly, the clearcut exercise was an
4 all-party exercise and as a result FFT was a full
5 participant. One of the first challenges was to
6 determine a methodology for determining what a
7 contiguous cut would be.

8 The committee agreed in calculating what
9 a contiguous cut was that they would go back 10 years
10 in time, and the committee was also able to refer to
11 cut-over maps, aerial photographs and make calculations
12 of the type and amount -- the amount of residuals left
13 within the outside perimeter of the cuts.

14 The most important aspect really of what
15 that exercise was, an important element was that it was
16 a retrospective look at clearcuts and, as a result,
17 they could look at actual cut-over maps using aerial
18 photographs and the like.

19 Now, the undertaking in relation to moose
20 habitat guidelines was not of the same sort. The cut
21 sizes were estimates of planned cuts, they were
22 prospective and, therefore, it was impossible to do
23 calculations in the same way as the clearcut exercise.

24 Secondly, in the clearcut exercise the
25 identification of the largest single cut and the

1 largest contiguous cut was an objective of the
2 exercise, whereas in the undertaking in relation to the
3 moose habitat guidelines the Ministry was not asked to
4 address contiguity, they were asked how the moose
5 habitat guidelines had been applied in the present
6 round of plans.

7 And, thirdly, as an administrative
8 matter, the clearcut exercise was an extensive and
9 lengthy exercise which took many months in order to
10 answer the question from the Board, and it was not
11 appropriate, the Ministry does not believe it was
12 necessary to develop -- pardon me, it was therefore
13 appropriate and necessary to develop a different
14 methodology for answering the undertaking regarding the
15 moose habitat guidelines.

16 The bottom line is that if the suggestion
17 was made that MNR was in some way cooking the books to
18 demonstrate something different than the clearcut
19 exercise or an attempt to mislead the Board because of
20 the differences in the methodology used, I would ask
21 you to find that such suggestion is unfair and that you
22 not accept it.

23 I want to deal for a moment with the
24 results of Mr. Benson's clearcut exercise, the one
25 which resulted in the size of contiguous cuts which Ms.

1 Swenarchuk enumerated for you during her oral argument
2 and which you will find identified in Exhibit 1604B
3 which is Volume No. 2 of FFT's Panel No. 5.

4 The methodology which Mr. Benson used on
5 that exercise to calculate contiguous clearcut size is
6 described in the first part of that witness statement -
7 and I don't have the pages, I'm sorry - but you'll
8 recall his evidence, and it's recounted in that witness
9 statement that this is the exercise where he used
10 remote imagery.

11 And Mr. Benson during his evidence
12 admitted that there were difficulties with
13 differentiating age of trees within the area which he
14 identified as the outside perimeter of the area that he
15 included in his calculation of contiguous cut-over.

16 This particular exercise is referred to,
17 and I'm going to refer to a portion of the transcript
18 as opposed to the argument, but it's discussed in MNR's
19 argument at pages 114 to 115 and in Volume 271 page
20 48936 to 37. I want to refer you specifically to
21 Volume 271, I'm going to quote from 48493 to 96.

22 And just so you know where I'm going,
23 Madam Chair, Mr. Martel, this is the exercise, this is
24 the imagery which led to the discussion about whether
25 Mr. Benson was able to tell the age of the trees in the

1 cut-over, and he indicated that he was unable to do it
2 and they could be 40 years old, and in fact they could
3 be 50 years old, this is what led to the discussion
4 about: Well, when does a clearcut stop being a
5 clearcut. And I think it's important just to draw your
6 attention to certain passages.

7 Mr. Benson on 48933:

8 "This is a photograph of one of the
9 the satellite images and this is near
10 Kapuskasing."

11 He indicates:

12 "The satellite photographs were taken
13 from an orbit of 40 miles up. The area
14 in this case I classify as a contiguous
15 clearcut and was roughly a boundary along
16 so...", he was indicating by hands,
17 "...and that's the one that was
18 classified as over 200,000 hectares as a
19 contiguous clearcut."

20 Mr. Martel asks:

21 "Were you able to get any time frame
22 in which the original cut started down to
23 the most recent ones?

24 "THE WITNESS: Just a very rough time
25 frame and only for the more recent

1 cuts. I'd like to do that."

2 He didn't do it, he said, I'd like to do
3 that.

4 Later, Madam Chair, you asked Mr. Benson
5 to follow up Mr. Martel's question with respect to the
6 sensitivity of the satellite image:

7 "How far back could they go with
8 respect to identifying an area as a
9 clearcut rather than a regenerated area,
10 for example, something had been cut 30
11 years ago, how far back would you go in
12 identifying clearcuts?

13 "MR. BENSON: That's a problem and
14 when you try to put ages on it, I
15 couldn't do that. I would estimate
16 probably 40 years but there could be some
17 areas within there that might be even 50
18 years ago."

19 That methodology is the same methodology
20 as the ones used on all of the clearcuts which were
21 reported as contiguous in Exhibit 1604D and which were
22 recounted to you by Ms. Swenarchuk. They are all
23 subject to the same difficulty.

24 And there was further evidence regarding
25 this methodology, and I refer you specifically to the

1 evidence of Dr. Runneson from LUCARIS. That matter,
2 Dr. Runneson's evidence is referred to on page 114 to
3 115 of our argument.

4 I believe the written evidence of Dr.
5 Runneson is in Volume 322 and his evidence was
6 supplemented by written answers to questions which were
7 posed to him after his evidence by Forests for Tomorrow
8 the OFIA and the Ministry of Natural Resources, and the
9 answers to those questions appear in Exhibit 2028.

10 And in the answers to the questions which
11 were posed by the Ministry of Natural Resources, in
12 particular Questions 6, 8, 9, and 10. I ask you to
13 look at all of them. Dr. Runneson comments on the
14 difficulties associated with the methodology which was
15 used, the need for specific expertise to use it, and
16 how that expertise is gained.

17 I urge the Board that when you read this
18 evidence of Mr. Benson's and consider the submissions
19 of Forests for Tomorrow regarding the size of the
20 contiguous cuts referred to, that you remember the
21 concerns about the methodology and, as a result,
22 question the reliability of the numbers which were
23 produced in his exercise.

24 Could I just have one moment, Madam
25 Chair.

1 ---Discussion off the record

2 MR. FREIDIN: I would like to then move
3 on to the next area of size of clearcut. And during
4 these submissions I'll be addressing the comment by
5 counsel for Forests for Tomorrow that the Ministry
6 position on this matter is somehow shifting sands or is
7 somehow questionable.

8 I would submit to you, Madam Chair, that
9 based on a review of the evidence of the parties to the
10 hearing that no one disagrees that a range of clearcut
11 sizes is a desirable end and that the purpose of
12 identifying a range of clearcut sizes would be to
13 replicate as closely as possible natural disturbance
14 patterns.

15 Forests for Tomorrow have suggested a
16 range of clearcut sizes but they are one which has a
17 hundred hectare limit with an opportunity to exceed
18 that hundred hectare limit if one can justify that
19 based on biodiversity concerns, and --

20 MR. LINDGREN: Madam Chair, just one
21 clarification. That's the third time I've heard Mr.
22 Freidin use the word limit to describe FFT's proposals.

23 I thought Ms. Swenarchuk was abundantly
24 clear when she said it's a guideline, not a limit, and
25 that's a substantial and significant distinction that

1 Mr. Freidin should keep in mind.

2 MR. FREIDIN: Well, I will call it a
3 limit and the Board will have to decide whether it's a
4 guideline.

5 In the ultimate determination, the
6 Ministry of Natural Resources still says it's a limit
7 and I would refer to it as that, realizing that Forests
8 for Tomorrow believes that that is an improper
9 characterization.

10 There is an opportunity, they say, to
11 exceed that hundred hectare limit if you can justify it
12 based on biodiversity reasons and you document your
13 justification.

14 They obviously must believe that small
15 clearcut sizes are somehow more compatible with
16 maintaining biodiversity in most cases otherwise they
17 wouldn't have suggested a range of clearcut sizes of
18 the type that they have.

19 The only evidence that I can think of
20 that spoke to this range of clearcut sizes by FFT was
21 that of Dr. Suffling, who you recall indicated in his
22 evidence that there was no room for clearcuts over 200
23 hectares in size as a result of his analysis of the
24 fire history in Ontario.

25 You will recall that the Ministry of

1 Natural Resources in reply Panel No. 2 called Mr. Paul
2 Ward as a witness, and you'll recall his expertise in
3 relation to fire management in this province and the
4 lengthy document that he prepared which went through
5 that history and which also critiqued the evidence of
6 Dr. Suffling, particularly Dr. Suffling's comment that
7 there was no room -- pardon me, Dr. Suffling's evidence
8 that clearcuts greater than 200 hectares when coupled
9 with large fires are exceeding the past level of
10 disturbance in that size class and are, hence,
11 unacceptable.

12 That's one of the five specific
13 suggestions made by Dr. Suffling which were addressed
14 by Mr. Ward in his paper and you'll find those five
15 items in Exhibit 2258 which is reply Panel 2 at pages 5
16 and 6.

17 I am not going to take you through that
18 report, I would just advise that the conclusion that
19 Mr. Ward came to after his extensive analysis of fire
20 history in this province that Dr. Suffling's contention
21 that there is no room for clearcuts larger than 200
22 hectares because fires larger than 200 hectares are as
23 prevalent now as in the past is not supportable.
24 You'll find that in Exhibit 2258, reply Panel 2, tab 3,
25 at page 12.

1 I would ask you to read that report, and
2 I note that Forests for Tomorrow did not mention Mr.
3 Ward's paper in their argument.

4 I would submit to you that it is a paper
5 which has considerable merit, and when you come to
6 decide whose evidence to accept in relation to the fire
7 history in this province and the size of disturbance
8 patterns created as a result of wild fire in this
9 province that you accept the evidence of Mr. Ward over
10 that of Dr. Suffling where it conflicts.

11 I would like to deal with the issue of
12 clearcut. I'd like to deal with the issue of clearcut
13 sort of in the context of the question which has come
14 up repeatedly from the Board and primarily from you,
15 Mr. Martel, and it came up in Forests for Tomorrow:
16 Well, why not a hundred, why not 200, like, why not a
17 limit? I want to start off by referring to some
18 evidence of Dr. Thompson.

19 MR. MARTEL: But I think if you might
20 though, I think I was talking in terms of -- let me put
21 it this way: The evidence we have on clearcuts is you
22 should have a range and it should replicate fire, and I
23 think the thing that's bothered me to some degree is
24 that I've heard all kinds of people say: I don't care
25 about the biological reasons, the biodiversity, I don't

1 care about any of it in northern Ontario, we think
2 clearcuts are too big.

3 I mean, whether you like it or not,
4 that's what people in northern Ontario say. And so
5 I've tried to put it in that context, Mr. Freidin,
6 I don't want to take it out of some other context.

7 What the owners can expect, regardless of
8 the evidence that all the experts have brought here,
9 and that's a question that still bothers me because
10 what I think they're suggesting - I might be wrong, but
11 I know a few of them in northern Ontario - what they're
12 suggesting is totally different from what all the
13 experts are saying, and I don't know how you answer
14 that question.

15 MR. FREIDIN: Let me answer that question
16 this way, Mr. Martel, and I'm doing that now as I
17 understand that you're saying that people have said I
18 don't care about the biological reasons, I just don't
19 like clearcuts.

20 Now, when I say they don't care about the
21 biological reasons, I'm not sure whether that means
22 they don't care about wildlife and they don't care
23 about biodiversity.

24 MR. MARTEL: Let me be very frank. They
25 look at a clearcut, Mr. Freidin, the public I know up

1 here, and some of the witnesses we have seen, they look
2 at a clearcut and, as a friend of mine said: A jack
3 rabbit has to carry a lunch pale to get across a
4 clearcut. And they are offended.

5 I say that, and that's why I've raised
6 this question over and over again. My experience is
7 that to them the big item of concern is going out there
8 along the highway or a road and seeing this massive
9 area cut. They don't ask about biodiversity, they
10 don't ask about wildlife, they think when you cut all
11 that to wildlife there's a disadvantage.

12 And I'm saying, I'm trying to put it in
13 that context that they're not trying to be
14 sophisticated, they simply see this massive cut and it
15 drives them bananas and they're the owners,
16 theoretically.

17 MR. FREIDIN: Let me begin my response by
18 referring to something that was contained in the review
19 of management planning in the United States. And I
20 refer to this knowing that some people, the situation
21 you've mentioned:

22 "No one is satisfied with agency
23 officials who see their role only as
24 mediators, who hold no strong values or
25 act as if they possess no expertise

1 of their own. Most of the Forest Service
2 simply seek to occupy the middle ground
3 between conflicting political pressures.
4 The agency must always argue
5 vigorously...", and this is what I

6 emphasize,

7 "...the agency must always argue
8 vigorously for maintaining the integrity
9 of the land and the resources for future
10 generations."

11 And I referred you in my
12 argument-in-chief about concerns that people have about
13 that very matter, maintaining the integrity of the land
14 and the resources for future generations if proper
15 management does not occur.

16 And so if the Board is convinced - and
17 remember this is an environmental assessment - if the
18 Board is convinced that by having clearcuts of one type
19 or another, and in this case I'm saying a whole bunch
20 of small cuts, that that will not maintain the
21 integrity of the land and the resources for future
22 generations, that that indeed is not consistent with
23 the attempts to conserve or maintain, biodiversity.
24 That that is not consistent with evidence that you have
25 heard about how one properly would manage for wildlife,

1 if you come to those conclusions - and those are the
2 two of the very basic issues that you have to address -
3 if you come to those conclusions, then I would submit
4 to you that you are in a situation no different than a
5 resource management agency, you must in fact do what is
6 correct for maintaining the integrity of the land and
7 the resources for future generations.

8 And if that means that you have to say,
9 or if that means that you conclude that a range of
10 small clearcuts will not do that, if that means that
11 you say, I accept the evidence of many witnesses who
12 appeared before us and said it would be a bad idea for
13 the resource, for biodiversity, for wildlife to impose
14 a regime where there was a series of small cuts across
15 the landscape, then you must find, I would submit, that
16 such a regime should not be put in place.

17 Now, what do you say to those who have
18 spoken to you over the many years that they hate those
19 big clearcuts, because they just don't like them.

20 If there is going to be a continuing
21 debate or people are going to remain, -- there will
22 always be people who will remain unsatisfied, there
23 will not be consensus on the issue of clearcut size. I
24 would submit to you that it is better to come down on
25 the side of doing what is best for the resource and to

1 attempt, as difficult as it may be, to explain to those
2 members of the public who say I don't care about the
3 biology and I don't care about those other matters, I
4 just don't like the size of clearcuts, it would be
5 better to have to explain to them why it makes good
6 resource management sense, why it is best for
7 maintaining the integrity of the land and the resources
8 for the future generations that we still have large
9 cuts; better that than the opposite.

10 Because if you ignore the evidence before
11 you on this issue and impose small clearcuts to address
12 the concern that you have indicated, Mr. Martel, to use
13 Dr. Baskerville's words, I think you would be
14 satisficing, you would be giving into that pressure,
15 social pressure, political pressure - I'm not too sure
16 how one would properly describe it - at the expense of
17 adverse effects on maintaining the integrity of the
18 land and the resources for future generations. That is
19 what expert after expert has said to you.

20 Now, there's no question there is a
21 difference on this issue. I mean, Forests for Tomorrow
22 are still advocating smaller clearcuts and they are
23 doing so because of their view of what science says
24 should be done. Then you've got other parties who
25 don't agree with that. So this is one of those

1 difficult situations where you're going to have to
2 choose and you will have to assess the evidence of all
3 the witnesses who spoke on this matter.

4 And I suggest to you that the large
5 weight of the evidence is strongly supportive of the
6 position being put forward by the Proponent on this
7 issue, that it is supported not only by witnesses who
8 work for the Proponent, that it is supported by other
9 professional witnesses who have come before you, and I
10 refer to Dr. Thompson and Dr. Welsh. I'm going to
11 refer you to something that Dr. Thompson said.

12 So that's really where it comes to. This
13 is going to be a big education job to be done, but
14 let's not avoid the difficult task of explaining to the
15 public or doing that education job at the risk of
16 making the wrong decision for the good of the
17 resource, you know, the right decision for the resource
18 itself.

19 One last comment on that, Mr. Martel.
20 It's indicated in our material that this Board has been
21 sitting for four and a half years and has been hearing
22 all these matters, and you've given people an
23 opportunity to come forward, some of them have come
24 forward and said exactly what you've said: We just
25 don't like them.

1 But this is the start. You are the
2 independent body. I mean, you're an independent body.
3 They appear before you, you gave them an opportunity to
4 have their say, and you're now charged with making
5 decisions and people are looking to that decision for
6 some guidance on this matter.

7 Now, if I could refer to Dr. Thompson,
8 the portion of his evidence begins at page 66133 and
9 I'm going to refer to portions from that section of the
10 transcript starting there and going to 66139. He says:

11 "I think that in terms of the
12 development of the model, what you want
13 to know are: What is the range of sizes
14 that occurred, what is the range of
15 intensity that occurred, what is the
16 range of biological legacies that are
17 left within these fires, and what are the
18 ecosystem processes that are different
19 after clearcutting as opposed to after
20 fire?

21 "And I think that if we work towards
22 developing these models, then we will
23 have a much better model for managing the
24 forest when you do that."

25 He goes on at 66134:

1 "I'm talking about the way in which we
2 distribute logging across the landscape
3 and I'm talking about the way in which
4 fire behaves in different ecosystem types
5 because that is very different.

6 "And so if we are going to do this
7 kind of management and work towards a
8 more natural means of regenerating the
9 forest then we must, I think, we must be
10 very cognizant of the way in which
11 natural disturbance affects all ecosystem
12 types."

13 And he says:

14 "It's much more than just size."

15 I'll address that matter and I've
16 addressed it already in my arguments-in-chief, that
17 size is an important aspect of this.

18 Mr. Martel you asked at 66135:

19 "Other people think clearcuts are far
20 too big and we have heard that more
21 frequently than any other complaint in
22 this hearing.

23 "DR. THOMPSON: I know, but I think
24 it's a mistake to listen to that.

25 "MR. MARTEL: Well, you tell the

1 public who owns the land that it's a
2 mistake to listen to it."

3 So you were raising the same thing.

4 "DR. THOMPSON: Well, I mean let's
5 think about the consequences of going out
6 and making a lot of small clearcuts on
7 the landscape.

8 "If large clearcuts are bad, and the
9 way in which they're done now I agree is
10 perhaps not the best way to do it, then
11 small clearcuts probably at the other
12 end of the spectrum are equally as bad
13 because they in no way mimic natural
14 processes in the way in which the boreal
15 forest develops.

16 "And if you want to regenerate the
17 boreal forest in some sort of natural
18 system way, if you want to regenerate the
19 natural forest in terms of the ecosystems
20 that are currently there, then the way
21 not to do it is to go out and log in
22 small patches because the boreal forest
23 is not driven in that way."

24 That is what MNR witnesses have been
25 saying from the beginning of the hearing. Dr. Thompson

1 continues at the bottom of 66137 and states:

2 "Boreal forests develop over broad
3 areas, they don't develop over little
4 tiny patches, and if you go out and use
5 cookbook forestry by saying that in jack
6 pine and in upland black spruce and
7 lowland black spruce and in boreal upland
8 mixed woods we're going to have a
9 clearcut size of 200 hectares, you're
10 going to destroy the system."

11 MR. MARTEL: What worries me, Mr.

12 Freidin, as I listened to all of that evidence by all
13 of the experts, one seems to assume that if one - and
14 we'll use Dr. Thompson's figures 200 - that 200 becomes
15 the figure that's always used, that one can't have a
16 range of 75 here, 190 there, we get this -- you see,
17 we've always got -- I'm not saying you, but we've seen
18 the evidence comes that it's either/or, it's a hundred
19 hectares that one party wants all the time or doesn't
20 want, it's what the effects of 130 will be all the
21 time, and I'm not sure why there isn't flexibility
22 considered.

23 You said, for example - let's use a
24 figure that hasn't been heard of yet, 210 - and all the
25 time you can operate within that 210 hectares any old

1 way you want and there will be reasons for differing,
2 but that doesn't seem to be what you hear from anyone,
3 it's always my way or the highway sort of approach.

4 And can you address that because I'm not
5 sure -- I know when I think about it I'm not thinking
6 in terms of something that's got to be there each and
7 every time, and so if you could address that it might
8 be helpful.

9 MR. FREIDIN: Let me begin firstly by
10 indicating that both Dr. Thompson and Dr. Welsh were
11 suggesting that a range should be determined and,
12 secondly -- and I'll get to the reasons for this
13 submission if you want.

14 MR. MARTEL: Should not or should?

15 MR. FREIDIN: There should be a range. I
16 would submit to you there's no magic in a number and on
17 one hand you ask yourself: Well, why have a limit if
18 there is no sound basis for a limit, and you've heard
19 from many witnesses who have said it doesn't make sense
20 to have a limit if there's no sound basis for it.

21 When you start talking about limits -- so
22 you've got that sort of in a general way, but let me
23 look at suggestions which have been made for limits or
24 a range of cuts, these small cuts going up with a limit
25 of a hundred.

1 In addition to the undesirability of just
2 imposing a limit which has no sound basis, there are
3 two problems that I submit exist in relation to setting
4 a limit. One is a practical one - and this is not the
5 most important of the two - it's a practical one, and
6 that is, you're going to set this limit, then you're
7 going to have documentation requirements every time you
8 exceed it or want to exceed it, you are going to put
9 the timber management planning process into a situation
10 where one of the things everybody seems to be trying to
11 avoid will in fact be created and that is more paper,
12 more analysis in relation to something which has
13 already been decided, really has no sound basis for it
14 in the first place.

15 And, secondly, let's assume, Mr. Martel,
16 that in an attempt to address the public's concern
17 about size of clearcut, assuming they would be happier
18 if they just knew that there was a limit, let's assume
19 that you chose the limit of a hundred hectares, what's
20 going to happen, you're going to go to the public that
21 have been asking you these questions and they're going
22 to say: Oh, well, great, the Environmental Assessment
23 Board has set a limit, we always wanted a limit and now
24 we've got it.

25 But the evidence you have heard is that

1 if you set that limit what's going to happen is you're
2 going to have a whole bunch of exceptions, all
3 necessary, all properly documented through a great
4 effort of a bunch of planners but you're going to have
5 a whole bunch of exceptions because the rule wasn't a
6 good one in the first place.

7 And then I ask you, or you should ask
8 yourself: What will the people who you are attempting
9 to satisfy be going to say then? They're going to say:
10 What a joke, a hundred hectare clearcut limit, my foot.
11 Look at this, look at all these exceptions.

12 You will be creating a situation where
13 people, if they are not cynical now, will be
14 extremely cynical of the system because what they will
15 see is a bunch of exceptions, and you know that the
16 exceptions will in fact be proper because science and
17 the witnesses who have come before you indicate that it
18 has to be, you have to have that range.

19 Now, the Ministry of Natural Resources
20 has recognized the need for a range and it's in the
21 Ministry's term and condition 78(b) where the Ministry
22 has proposed that it will prepare environmental
23 guidelines which will provide for a range of clearcut
24 size and that it will be developed by people who have
25 expertise in that area.

1 Forests for Tomorrow in their submissions
2 indicated that they were somewhat troubled by this
3 interpretation of the written argument of the Ministry
4 of Natural Resources, that there was somehow a backing
5 away from a commitment to prepare such guidelines.

6 The Ministry of Natural Resources is not
7 changing its commitment in that regard. The Ministry
8 of Natural Resources' commitment as described in term
9 and condition 78(b), and you will note that it is
10 amended and you'll find the amendment on page 873 of
11 our argument, commits to in fact sit down with the
12 experts and develop the range which is appropriate.

13 Forests for Tomorrow have said: Well, we
14 think the range should be a range of small cuts up to a
15 hundred. My submission to you is that on the evidence
16 that you have heard, including the evidence I've just
17 referred to from Dr. Thompson, that's just isn't the
18 range, and if that isn't the range -- if you agree that
19 that isn't the range and you impose it as a term and
20 condition, it's going to give rise to the problems that
21 I mentioned before.

22 If I might just have a moment to...

23 MADAM CHAIR: Can we have a five-minute
24 break, Mr. Freidin?

25 MR. FREIDIN: Yes.

1 MADAM CHAIR: Thank you.

2 ---On recessing at 3:30 p.m.

3 ---On resuming at 3:40 p.m.

4 MADAM CHAIR: Go ahead, Mr. Freidin.

5 MR. FREIDIN: I would like to conclude my
6 comments in relation to this issue of clearcuts, and
7 particularly the range of clearcut sizes, by firstly
8 referring you to Dr. Thompson's evidence as to where he
9 indicated that a range was required.

10 It was referred to at MNR argument pages
11 313 to 314. In terms of Dr. Welsh, he said that a
12 range was required and that the range will vary across
13 the province; that is, it would be different in Kenora
14 than it might be in Sault Ste. Marie -- or did he say
15 Sault Ste. Marie. He didn't use those exact words, but
16 he said vary across the province.

17 You'll find that in Volume 383 at pages
18 66213 to 66225, and he deals with a lot of other issues
19 in that section which I will refer you to in a moment,
20 but the discussion about the range is there.

21 He also said that concerns arise from the
22 popular press regarding what happens on the west coast
23 and that there is a need to help each other understand.
24 In that regard I would just like to read a very brief
25 section from Dr. Welsh's cross-examination commencing

1 at pages 66216 at line 12 to 66217 line 19.

2 Dr. Welsh said the following:

3 "Certainly the clearcut size
4 consideration is something we all think a
5 great deal about right now and I would
6 like to -- we sort of try to imagine
7 from a national perspective. A lot of
8 our present public knowledge about
9 clearcut size I believe stems from
10 popularized something from what's
11 happening in west coast forests."

12 He goes on:

13 "And I would argue any clearcut size
14 there is nonsense on the west coast
15 because you really can't regenerate those
16 forests in a natural way and have
17 clearcuts.

18 "Equally you can't use uneven-aged
19 forest harvesting in a jack pine forest
20 in Ignace or a clearcut of 20 or 30 or 40
21 hectares and regenerate the landscape
22 because that's not the way that landscape
23 works.

24 "We have to do something different
25 when we're working north of Sault Ste.

1 Marie from what we do at Ignace. Let
2 alone, we can't do the same thing on
3 Vancouver Island that we do in Ontario,
4 and I think that is the point.

5 "And what we have to do is to try to
6 help each other to understand what the
7 differences are."

8 The Ministry of Natural Resources in
9 reply Panel No. 2 Exhibit 2258 at page No. 11 states in
10 relation to this matter as follows:

11 "In the near term it is MNR's
12 intention to address the subject of
13 clearcut size and distribution using the
14 best available scientific information.

15 "For this reason direction will be
16 developed which provides specific
17 information on harvest block layout on
18 the basis of Ontario's ecoregions. This
19 information will describe...", and the
20 very first item that is referred to is:

21 "...normal ranges of clearcut block sizes
22 by ecoregion based on natural patch size
23 and distribution derived from information
24 such as tree silvics, forest stand
25 distribution, and regional fire history

1 patterns."

2 So the Ministry of Natural Resources is
3 saying the same thing as Dr. Welsh and recognizes
4 there's a need for the range of clearcut sizes to be
5 different, that they may vary based on ecoregions as
6 one looks across the entire area of the undertaking.

7 A related topic that I just want to
8 address briefly is the moose habitat guidelines. And I
9 thought it might be useful to just mention them in the
10 context of this discussion because you may ask
11 yourself: Well, don't you have a clearcut limit about
12 the moose habitat guidelines, so why don't we impose a
13 limit just like the moose habitat guidelines.

14 My answer to that is, firstly, those
15 guidelines in relation to clearcut are there for moose
16 management purposes. As you are aware, there is an
17 obligation to provide a rationale if one exceeds 260
18 hectares, that is, for moose management purposes, it is
19 not a clearcut limit, FFT agreed that it's not a
20 clearcut limit.

21 Another issue which was: What about the
22 70 per cent of the wildlife species, and this again is
23 not directly on point but it's related and I wanted to
24 address it: What about 70 per cent of the species who
25 have habitat provided as a result of moose management,

1 what happens if moose capability is low and, therefore,
2 one exceeds the ideal in high capability area of 130,
3 in fact you may go beyond 260 in a low capability area.

4 The suggestions were made during FFT's
5 submissions and cross-examination that somehow 70 per
6 cent of the species would be adversely affected or not
7 adequately addressed if you had those clearcuts going
8 beyond 260, for example, for moose management purposes.
9 That was their suggestion.

10 What was the evidence in that regard.
11 The only evidence in that matter is the evidence of
12 John McNicol, who was asked specifically about that
13 matter in cross-examination by Mr. Lindgren. Again, if
14 I can have a moment I will find it. I'm referring to
15 Volume 388 page 66872 to 875, and I would commence just
16 by reading the question from Mr. Lindgren:

17 "We heard the MNR claim from time to
18 time that applying the moose habitat
19 guidelines benefits some 70 per cent of
20 the terrestrial vertebrates in the area
21 of the undertaking.

22 "Can you tell me precisely
23 how these 70 per cent are benefitted when
24 you are not applying the moose guidelines
25 as rigorously as they should be; namely,

1 when you are exceeding the 260-hectare
2 suggested area?

3 Mr. McNicol describes the difference
4 between high, low and medium capability areas and he
5 states at page 66873, lines 10 to 18 as follows, after
6 indicating that there is a -- he says.

7 "What I'm saying is in those areas
8 where we do not apply the guidelines
9 rigorously there is not as diverse a
10 suite of species in those forests as in
11 forests where guidelines are applied
12 rigorously, and the species that benefit
13 generally from a rigorous application of
14 the guidelines do not, as a
15 generalization, exist in those types of
16 forests to the same degree as they do in
17 those areas of moderate to high
18 capability."

19 That is the evidence that you have in
20 relation to that question, and I would submit to you
21 that having regard, particularly to the expertise of
22 Mr. McNicol, that it is evidence upon which you can
23 reasonably rely.

24 Madam Chair, it's ten to four. I think
25 it would be an appropriate time to break, rather than

1 starting but not finishing my next topic, and I think
2 actually the next three topics were going to be
3 addressed as a package, I prefer to deal with it as a
4 package, and I don't think we will have any difficulty
5 finishing tomorrow if we break 10 minutes early.

6 MADAM CHAIR: All right. Thank you very
7 much, Mr. Freidin.

8 We will adjourn and be back at nine
9 o'clock tomorrow morning.

10 ---Whereupon the hearing was adjourned at 3:50 p.m., to
11 be reconvened on Thursday, November 12th, 1992,
12 commencing at 9:00 a.m.

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